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No. 95 393

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DAVID HELLER,

Petitioner,

v.

SYLVIA SMITH BOWMAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, under this Court's holding in Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988), states may constitutionally impose tort liability for the pure expression of opinion utterly devoid of false factual statements made in the course of an election campaign for the presidency of an 8,700-member statewide public employees' union local, where the expression was made as a political satire by a supporter of one candidate in the course of the election, was expressly designed to ridicule the political views and candidacy of an opposing candidate, and was narrowly circulated to a few of Petitioner's friends amongst the union electorate?

2. Whether, under this Court's holding in Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974), a candidate who has voluntarily chosen to run for the presidency of an 8,700-member statewide public employees' union local may constitutionally be deemed not to be a public figure for the purposes of an expression of opinion directed against her, where that expression was made as a political satire by a supporter of an opposing candidate in the course of the election campaign, was expressly designed to ridicule the political views and candidacy of an opposing candidate, and

was narrowly circulated to members amongst the union electorate?

3. Whether the First Amendment, as applied to the states through the Fourteenth Amendment, ever permits states to impose tort liability for the pure expression of opinion utterly devoid of false factual statements?

4. Whether states may constitutionally impose tort liability for the infliction of emotional distress based on judicial determinations of fact imbued with the kind of viewpoint discrimination condemned by this Court as unconstitutional in American Booksellers Ass'n v. Hudnut, 475 U.S. 1001 (1986), aff'g, 771 F.2d 323 (7th Cir. 1985), and R.A.V. v. City of St. Paul, Minn., 112 S. Ct. 2538 (1992)?

LIST OF PARTIES

The parties to the proceedings in the Massachusetts Supreme Judicial Court were the petitioner David Heller and the respondent Sylvia Smith Bowman.

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principles set forth in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1973), constitutes an end run around Hustler Magazine v. Falwell, 485 U.S. 46 (1988), highlights a conflict amongst federal circuit courts and state appellate courts, and has serious implications for the free speech rights of American citizens in union elections and in the workplace.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

DAVID HELLER,
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v.

SYLVIA SMITH BOWMAN,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF
THE COMMONWEALTH OF MASSACHUSETTS

Petitioner David Heller, an individual, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts, entered on June 13, 1995.

OPINIONS BELOW

The decision of the Supreme Judicial Court for the Commonweath of Massachusetts is reproduced below at A.2.[1] The Memorandum and Order of the Suffolk Superior Court, per Flannery, J., is reproduced below at A.47.

JURISDICTION OF THIS COURT

This Court has jurisdiction under 28 U.S.C. § 1257(1988) to review the judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts, entered on June 13, 1995.

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[1]The Appendix attached hereto is cited as "(A.)." The Record Transcript is cited herein as "(R.)."

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I provides, in pertinent part: "Congress shall make no law ... abridging the freedom of speech or of the press ...."

U.S. Const. amend. XIV, § 1 provides, in pertinent part: "... nor shall any state deprive any person of life, liberty or property, without due process of law ...."

STATEMENT OF THE CASE

At the time of the incident, respondent-plaintiff Sylvia Smith Bowman, then 60 years old, was a supervisor in the Worcester office of the Department of Public Welfare ("DPW"). In her twenty years with DPW, Bowman had long been a "prominent" and "extremely active" member of Local 509 of the Service Employees International Union ("union"), holding numerous voluntary political positions in

the union.

In 1987, Bowman went on leave to run for president of the 8,700-member statewide union local against the incumbent. Bowman had run against the incumbent several years earlier and had lost.

At the time of the incident, the petitioner-defendant David Heller was a non-supervisory employee working in the same office as Bowman. Heller, too, had been "very involved" in union affairs, having been an active and "avid supporter" of the incumbent president, and an equally avid opponent of Bowman's.

There was evidence that Bowman had used "sexual ... epithet[s], "such as "limp dick," "ass," and "prick" around the office

(R.664-665,977-978;1250), and that Bowman had falsely accused Heller and his candidate of being "communists" and had told him that she "hate[d] his politics" (R.976,978-979). There was also evidence that Heller had a reputation in the office for "gender-fairness" and for "get[ting] along with most everyone, female and male" (R.240-241,1046,1249). There was no evidence that Heller ever said anything negative about Bowman as an employee or supervisor.

In response, in October, 1987, as the campaign was heating up, Heller produced two photocollages by cutting out Bowman's name and a photograph of her face taken from her campaign postcards and pasting

them atop photographs of a naked and a partially naked female body which he had clipped from a Penthouse or Hustler-style magazine.[2] Heller made five or six photocopies and showed or distributed them to five coworkers in the Worcester office "who[m] [he] thought would appreciate them" (A.50-51; R.235,266-267,1065,1147-48,1340-44). It was clear from the caricatures themselves, and from the testimony of

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[2]Although both the Massachusetts Supreme Judicial Court and the trial judge referred to the magazines from which the photographs were taken as "pornographic," this Court has found that, unlike "obscenity," pornography -- to the extent that it is a legally cognizable term at all -- does not constitute "low value speech" warranting lessened constitutional protections. See American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1986) (invalidating Indianapolis pornography ordinance). In the instant case, the photocopies were plainly not "obscene" under Miller v. California, 413 U.S. 15 (1973), nor was that issue ever litigated by the plaintiff.

several witnesses, including Bowman, that the bodies depicted in the caricatures were not, and could not have been, viewed as, nor meant by Heller to be viewed as, Bowman's real body (see R.277-278,392-393,1074). The bodies depicted were those of young, thin women, while Bowman herself was a sexagenarian described by one witness as "obese" (R.367).

Heller testified that although "it was not his intent to sway votes or to induce people not to vote for [Bowman], "it was his intent "to poke fun at [her] campaign, just to make a political satire" and that "the picture looked so absurd that it kind of reflected the absurdity of some of her views and statements" (R.1074). As the

Supreme Judicial Court correctly observed, Heller made no further photocopies and did not intend that Bowman would see the photocopies (A.8-9).

It was undisputed that "sexual jokes" and "dirty pictures" were "pass[ed] through the office all the time" (R.50-51;R. 235,266-267,1053) and that Heller himself had previously prepared and distributed a number of satirical pictures.

The plaintiff first learned of the existence of the sexual caricatures and of their distribution throughout the office while she was campaigning and responded by "ma[king] light" of them (R.348,397-398). After the campaign was over, Bowman had her campaign manager show her the photocopies,

which, she testified, "shocked" her, made her feel "degraded, publicly humiliated, and vulnerable," and, according to the plaintiff's experts, caused her to suffer Post-Traumatic Stress Disorder (A.9-10).[3]

This lawsuit was filed in 1990 by Bowman in Suffolk County Superior Court, charging Heller, two supervisory employees, and the Commissioner of DPW, with intentional and reckless infliction of emotional distress, defamation, and with violating the Massachusetts Civil Rights

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[3]Before filing the instant lawsuit, Bowman filed complaints with DPW administrators, with the union, and with the Massachusetts Commission Against Discrimination. Heller was found by DPW to have "sexually harassed" Bowman, and was suspended for five days without pay. Heller was also reprimanded by the union for conduct unbecoming a union member, and, as a result of that reprimand, made a public written apology to Bowman and the union and signed a Memorandum of Understanding.

Act ("Civil Rights Act"), G.L. c.12, §11I, by having deprived Bowman of her right to run for union office.[4] On the eve of the first trial date, almost two years after the filing of the lawsuit, Bowman moved to amend her original complaint by adding an allegation that Heller had violated Bowman's rights under the Civil Rights Act by depriving her of her right to be free from sexual harassment.

After a jury-waived trial, the trial court found that "Bowman became a public figure with respect to the Union election

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[4]Before trial, a Settlement Agreement was reached with the other defendants to the litigation and the cases against them were dismissed. The defamation count against Heller was subsequently dismissed on the plaintiff's own motion. Heller filed a counterclaim against Bowman for defamation which was subsequently rejected by the judge after trial.

by virtue of her candidacy," upheld Bowman's claims for tortious infliction of emotional distress, sexual harassment, and violation of Bowman's civil right to run for union office, on the ground that the photocopies amounted to "nothing more than a reduction of Bowman to a sexual object and an attack on her as a woman, rather than as a political candidate" (A.67-68, 69), and, as a result, awarded Bowman $35,000 in damages.[5]

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[5]The trial judge's ruling was also premised on his erroneous conclusion that because the photocopies failed to convey a particularized message expressing an "articulable political statement," and because the "photocopies were nothing more than a reduction of Bowman to a sexual object and an attack on her as a woman," they were not sufficiently "expressive" to warrant constitutional protection (A.23,69). This proposition, however, has since been decisively rejected by this Court in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, __ U.S. __, 1995 WL 360192 (1995), where this Court unanimously ruled that "a narrow, succinctly articulable message

Heller filed a timely notice of appeal initiating the appellate process before the Massachusetts Appeals Court. The case, however, was taken by the Supreme Judicial Court, sua sponte, and docketed for oral argument by all seven justices of the Court. In it decision of June 13, 1995, which is being appealed herein, the Supreme Judicial Court vacated the trial court's findings that Heller had sexually harassed Bowman and violated her civil right to run for union office on adequate and

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is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,'... would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll." As in Hurley, Judge J. Harold Flannery in the instant case adopted an overly expansive reading of state civil rights statutes in order to trump precious First Amendment protections on behalf of politically correct causes.

independent state statutory grounds,[6] but reversed the trial court's finding that Bowman was a "a public figure with respect to the Union election by virtue of her candidacy," ruling that the caricatures were not constitutionally protected and that Heller was liable to Bowman for infliction of emotional distress notwithstanding the plain dictates of this Court's holdings in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1973), and Hustler Magazine v. Falwell, 485 U.S. 46 (1988).

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[6]Although the trial court's opinion as well as the briefs of the parties below were almost exclusively focused on the plaintiff's novel claims under the hostile workplace sexual harassment doctrine, the Supreme Judicial Court managed to dispense with this issue in a summary three-sentence footnote, ruling that "[t]he distribution of the two photocopies did not constitute a threat, intimidation, or coercion as defined by the M[assachusetts] C[ivil] R[ights] A[ct]" (A.6 n.4).

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW, IN RULING THAT UNION ELECTIONS ARE NO MORE "PUBLIC CONTROVERS[IES]" THAN ELECTIONS FOR SOCIAL CLUBS OR CONDO ASSOCIATIONS, AND THAT A PROMINENT UNION POLITICAL ACTIVIST RUNNING FOR PRESIDENT OF A STATEWIDE 8,700-MEMBER PUBLIC EMPLOYEES' UNION WAS NOT A LIMITED PURPOSE PUBLIC FIGURE, DESPITE THE ELECTION CONTEXT IN WHICH THE EXPRESSION OF OPINION WAS PUBLISHED, VIOLATES FUNDAMENTAL PRINCIPLES SET FORTH IN GERTZ V. ROBERT WELCH, INC., 418 U.S. 323 (1973), CONSTITUTES AN END RUN AROUND HUSTLER MAGAZINE V. FALWELL, 485 U.S. 46 (1988), HIGHLIGHTS A CONFLICT AMONGST FEDERAL CIRCUIT COURTS AND STATE APPELLATE COURTS, AND HAS SERIOUS IMPLICATIONS FOR THE FREE SPEECH RIGHTS OF AMERICAN CITIZENS IN UNION ELECTIONS AND IN THE WORKPLACE.

The ruling of the Supreme Judicial Court that respondent-Bowman was not a limited purpose public figure was based on its erroneous conclusions -- reached as a matter of law -- that the results of a union election campaign for the presidency

of an 8,700-member union "would [not] be felt by persons who were not participants in the union election contest" and that such an election campaign "ha[s] no more public controversy than the usual election of a president of a social club or an election to the governing board of an educational institution, to the directorship of a corporation, or to the governing body of a condominium association" (A.19) (citation to Georgia Appeals Court decision omitted).

This ruling starkly conflicts with principles first articulated by this Court in Gertz v. Robert Welch, Inc., supra, 418 U.S. 323, and elaborated by a substantial body of federal First Amendment

jurisprudence.[7] Under the standard set forth in Gertz and subsequent cases, an individual will be deemed a limited purpose public figure if a "public controversy" exists, the plaintiff "played a sufficiently central role in the controversy," and the statements directed against that individual were "germane to the plaintiff's participation in the controversy." See Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1296-1298 (D.C.Cir.), cert. denied, 449 U.S. 898 (1980).

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[7]The determination as to whether or not the plaintiff is a limited public figure is plainly a question of federal law, see Wolston v. Readers Digest Ass'n, 443 U.S. 157, 165-169 (1979), and is thus subject to review by this Court based upon "an independent examination of the whole record." See New York Times v. Sullivan, 376 U.S. 254, 285 (1964).

Under this test, "a union election," as the dissenting opinion by Justice Nolan makes clear, "is the absolute paradigm of a public controversy" as "the election would have had an effect on each of the 8,700 members of Local 509" (A.30). The vast majority of federal and state courts which have squarely confronted the issue have held that union officers and individuals running for union office are limited purpose public figures, even where the union involved is small and contains only private sector employees, unlike the 8,700-member state and municipal employee union at issue here.[8] Indeed, until

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[8] See, e.g., Miller v. Transamerican Press, Inc., 621 F.2d 721, 724 (5th Cir.), same case, 628 F.2d 932 (5th Cir.1980), cert. denied, 450 U.S. 1041 (1981)(high ranking Teamster official was a public

arriving at its peculiar ruling in this case, the Supreme Judicial Court had itself squarely held, as a matter of law, that a secretary-treasurer of a union local was a limited purpose public figure simply

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figure); Guam Fed'n of Teachers, Local 1581 v. Ysrael, 492 F.2d 438, 439 (9th Cir.), cert. denied, 419 U.S. 872 (1974) (noting that officers of teachers union were public figures); Henry v. National Ass'n of Air Traffic Specialists, 836 F.Supp. 1204, 1206 n. 3, 1211 n. 6 (D.Md.1993), aff'd without opinion, 34 F.3d 1066 (4th Cir.1994) (elected union leaders of 1,700-member union were public figures). See also Batson v. Shiflett, 325 Md. 684, 722, 728, 602 A.2d 1191 (1992) (president of small town union local was a public figure); Miles v. Perry, 11 Conn. App. 584, 592 n. 7, 529 A.2d 199 (1987) (noting that union officers generally deemed public figures for purposes of union business); Lins v. Evening News Ass'n, 129 Mich.App. 419, 432, 342 N.W.2d 573 (1983) (union officers are limited purpose public figures); City Firefighters Union, Local 28 v. Duci, 104 Misc.2d 498, 503 n. 7, 428 N.Y.S.2d 772 (1976) (same); Hanlon v. Davis, 76 Md.App. 339, 357, 545 A.2d 72 (1988)(observing that trial court instructed jury that president of "small" government employees union of 450 members was a public figure); Jean v. Dugan, 20 F.3d 255, 262 n.7 (7th Cir. 1994). Moreover, as the dissent further points out, this election campaign might well have commanded an "increased level of public interest" as many members of the union were state workers employed by DPW and paid by state taxpayers (A.30n.2).

because he had "voluntarily thrust himself into the controversy by campaigning for reelection to th[at] position", even though the local had only 1,400 members -- one-sixth the size of the local in the instant case. See Materia v. Huff, 394 Mass. 328, 330-333 (1985).

Moreover, it can hardly be disputed that Bowman "played a sufficiently central role" in the election. Bowman had been, by all accounts, a "very active" and "very prominent" member of the union throughout her career, having occupied over a dozen union political posts, all of which were voluntary, and none of which were prerequisites of her job. Nor is this a case where "publicness" has been thrust

upon a private citizen. Bowman chose to run for office.

Although the majority below declined to determine whether the photocopies were "germane to the plaintiff's participation in the union election" (A.16 n.15), it is clear that the photocopies were indeed "germane" to Bowman's controversial candidacy for president. The photocopies were constructed using Bowman's own campaign materials and circulated during the height of the campaign as part of an ongoing, contentious, political, and personal dialogue between Bowman and Heller. Their circulation was narrowly targeted at less than a half-dozen union members, all of whom were part of the union

electorate. Moreover, there is no evidence that Heller ever ridiculed Bowman as a worker or supervisor, but only as a candidate.

In this country, for better or for worse, when a candidate throws her hat into the ring, the candidate as well as her ideas are before the voters. Accordingly, ad hominem attacks and personal invective have long been a staple of constitutionally-protected political campaign rhetoric. Even if, as the trial court found, Heller had intended the photocopies to "reduc[e] ... Bowman to a sexual object" and to "attack ... her as a woman" (A.69), he was entitled to do so just as previous candidates and their

supporters have urged others to vote against George Washington because he was an "ass" (see Hustler Magazine, supra, 485 U.S. at 54), John F. Kennedy because he was Catholic, Richard Nixon because he was a "a liar and a crook," Ronald Reagan because he was "old and senile," Jesse Jackson because he is an African American, or Bill Clinton because he is a "womanizer" or because his wife is a "dominatrix" (see Addendum attached hereto). To deny this parody the constitutional protection afforded others under Hustler is to elevate political correctness to a constitutional principle.

While Heller stated that he did not intend the photocopies to influence the

outcome of the election because he believed that those to whom he distributed them had already made up their minds, he also stated that he did intend them to be "political satire[s]" and wanted to make Bowman look as "absurd" and "ridiculous" as her ideas (A.9;R.50,19,913,1074,1178). The Supreme Judicial Court's single-minded reliance on the former statement not only ignores the entire election context in which the photocopies were distributed, but also overlooks the multitude of purposes routinely served by campaign speech, including criticizing, demoralizing and even insulting the opposition, as well as rallying one's own campaign troops.

Moreover, the Supreme Judicial Court's

bizarre attempt to analogize union elections to elections in social clubs or condo associations fundamentally misunderstands the importance of union democracy to the daily lives of working men and women throughout the country and to the importance of "uninhibited, robust, and wide-open debate" in the labor union context.[9] Social clubs and condo

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[9]See Old Dominion Branch No. 496, National Ass'n of Letter Carriers, AFL-CIO v. Austin, 418 U.S. 264, 273 (1974) (hereinafter "Letter Carriers") (also recognizing that "exaggerated rhetoric was commonplace in labor disputes"); Linn v. United Plant Guard Workers, 383 U.S. 53, 63 (1966) (holding that federal labor policy preempts state defamation law in the labor union context and that the "actual malice" standard, which applies to allegedly defamatory statements made in that context, dictates that even "the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth"). See also Wirtz v. Local Union No. 125, Laborer's Int'l Union of N. Am., 389 U.S. 477, 483 (1968); Wirtz v. Local 153, Glass Bottle Blowers' Ass'n of U.S. & Can., 389 U.S. 463, 475 (1968); Thornhill v. Alabama, 310 U.S. 88, 102-103 (1940).

associations are not only far smaller, as a rule, than the 8,700-member statewide public employees' union local at issue here, but also, as the dissent correctly points out, are "purely private organizations created to protect the private entertainment or the private property interests of their members" (A.30n.2), which do not raise the kind of issues of public concern raised by elections amongst unions largely comprised of state workers.[10]

This Court's resolution of the issues

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[10]Of course, as the dissent points out, even elections in unions comprised solely of private sector employees are frequently highly politicized and of compelling interest to the general public. The public has legitimate and compelling interests in the democratic functioning of all areas of civil society, not simply in areas directly implicating the interests and actions of the state.

raised herein would have the added salutary effect of resolving once and for all which of the "various tests" for applying the Gertz standard are to be followed by both state and federal courts throughout the land, tests which have diverse criteria and which have produced equally diverse outcomes.[11]

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[11]Compare three-prong test, set forth ante at 16, in Waldbaum v. Fairchild Publications, Inc., supra, 627 F.2d at 1296-1298 (D.C. Cir.); Trotter v. Jack Anderson Enterprises, 818 F.2d 431 (5th Cir. 1987); O'Donnell v. Columbia Broadcasting Service, 782 F.2d 1414 (7th Cir. 1986), with the four-prong test set forth in Lerman v. Flynt Distrib. Co., Inc., 745 F.2d 123, 136-137 (2d Cir. 1984), cert. denied, 471 U.S. 1054 (1985) (defendant must show that plaintiff: "(1) successfully invited public attention to his views in an effort to influence others prior to the incident that is the subject of litigation; (2) voluntarily injected himself into a public controversy related to the subject of the litigation; (3) assumed a position of prominence in the public controversy; and (4) maintained regular and continuing access to the media"); and the two-prong test in Steaks Unlimited v. Deaner, 623 F.2d 264, 273 (3d Cir. 1980) (defendant must prove that plaintiff had significantly greater access to channels of effective communication than private individuals

The ruling below amounts to nothing less than a judicial end run around Hustler Magazine v. Falwell, 485 U.S. 46 (1988), and an attack on the tolerance of the unhampered expression of opinion,

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normally enjoy and that plaintiff effectively assumed the risk of potentially unfair criticism by entering into the public arena and engaging the public's attention); Silvester v. American Broadcasting Cos., Inc., 839 F.2d 1491, 1493 (11th Cir. 1988); and the five-prong test in Fitzgerald v. Penthouse, 691 F.2d 666, 668-669 (4th Cir.), cert. denied, 460 U.S. 1024 (1983) (defendant required to prove 1) that plaintiff had access to channels of effective communication, 2) that plaintiff assumed a prominent role in the controversy, 3) that plaintiff attempted to influence the outcome of the controversy, 4) that the controversy existed prior to the publication of the defamatory statements, and 5) that plaintiff obtained public figure status at the time of the alleged defamation); and the more orthodox approach followed in Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 590 (1st Cir. 1980) (tracking the two-pronged test in Gertz); Clark v. American Broadcasting Company, 684 F.2d 1208, 1218-1219 (6th Cir.), cert. denied, 460 U.S. 1040 (1983); In re IBP Confidential Business Documents Litigation, 797 F.2d 632, 644-645 (8th Cir.), cert. denied sub nom. Bagley v. IBP, Inc., 479 U.S. 1088 (1987) (en banc); Arnheiter v. Random House, 578 F.2d 804, 805 (9th Cir. 1978); Lawrence v. Moss, 639 F.2d 634, 637-638 (10th Cir.), cert. denied, 451 U.S. 1031 (1981).

however insulting, degrading, or offensive which this Court has long insisted upon -- all in the name of political correctness. In its unanimous decision in the Hustler case, this Court made clear, without dissent, that First Amendment principles, originally developed in the context of defamation cases, bar public figures from recovering for expressions of opinion -- including sexually explicit satires far more offensive than those at issue here -- which do not contain statements of fact which are provably "false." This is because, unlike "false statements of fact" which unduly interfere with the truth-seeking function of the marketplace of ideas and which cannot as easily be

repaired by counterspeech, see Gertz v. Robert Welch, Inc., supra, 418 U.S. at 340, 344 n.9, expressions of personal opinion lie at the core of the freedoms of expression embodied in the First and Fourteenth Amendments. See id. at 339-340 ("[u]nder the First Amendment there is no such thing as a false idea[;] however pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas"). See also R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) ("[w]hen government regulates political speech or 'editorial opinion on matters of public importance[,] ... First Amendment protection is at its zenith'") (citations

omitted). Although this Court in Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990), declined to create a wholly separate category of "opinion privilege," the Court made clear that "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection," and that only expressions of opinion which imply defamatory assertions of fact which are capable of being proven "false" are constitutionally subject to liability. Id. at 20.

In the instant case, the photocopies were plainly expressive of personal and political opinion, utterly devoid of

provably "false" factual statements.[12] The photocopies were clearly composites created by pasting photographs of Bowman's face and name on top of photographs of the bodies of others (see R.1337-38) and could not have "reasonably be[en] understood as describing actual facts about [Bowman] or actual events in which [s]he participated," Hustler Magazine, supra, 485 U.S. at 49 (citation omitted), nor could they, in any meaningful sense, have been proven "false." Because Bowman became a "public figure" by running for union office, and because the

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[12]The lower court's assertion that "Heller's caricatures did not constitute an 'articulable political statement,'" while the Hustler ad parody "impl[ied] a sexual and moral hypocrisy on the part of Falwell" (A.68), was flatly rejected by this Court in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, supra, 1995 WL 360192.

satires were pure expressions of opinion, Bowman should have been required to establish the "actual malice" required by Hustler Magazine.

As the Justices Nolan and Lynch make clear in their well-reasoned dissent, because "the plaintiff became a limited purpose public figure when she voluntarily thrust herself into the election campaign," because "the caricatures ... addressed the plaintiff's campaign for the presidency, despite their horrid content," and because the caricatures were not shown to contain any "false statement[s] of fact" (A.26-27), the plaintiff utterly failed to prove "actual malice" as required by this Court in Hustler (A.20). The only real

distinction between this case and Hustler is that this case involves a woman public figure subjected to sexual caricature.

To the extent that the ruling of the state court below was premised upon findings of fact that "establishe[d] an 'approved' view of women [and] of how the sexes may relate to each other," the state court's ruling must be invalidated as improperly based on unconstitutional "viewpoint discrimination," as condemned in American Booksellers Ass'n v. Hudnut, supra, 771 F.2d 323, and R.A.V. v. City of St. Paul, Minn., 112 S. Ct. 2538 (1992). See also Shelley v. Kraemer, 334 U.S. 1 (1948).

CONCLUSION

Because the decision below -- by ruling that union elections, particularly of public sector employees, are no more "public controvers[ies]" than elections for social clubs or condo associations, and that a prominent union political activist running for president of a statewide 8,700-member public employees' union was not a limited purpose public figure, despite the election context in which the expression of opinion was published -- violated fundamental principles set forth in Gertz, constituted an end run around Hustler, highlights a conflict amongst federal circuit courts and state appellate courts, and has disturbing implications for the

free speech rights of American citizens in union elections and in the workplace, this Court should grant this petition for certiorari.

Respectfully submitted,

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Dated: September 8, 1995

APPENDIX

Decision of the
Supreme Judicial Court for the
Commonwealth of Massachusetts,
entered June 13, 1995 . . . . . A.2

Memorandum and Order of
Suffolk County Superior Court
Judge J. Harold Flannery ,
entered July 9, 1993 . . . . . A.47

Sylvia Smith BOWMAN

vs.

David HELLER[1]

Supreme Judicial Court of Massachusetts, Suffolk.

Argued Jan. 10, 1995.

Decided June 13, 1995.

Alan M. Dershowitz (Michael R. Schneider, with him), Cambridge, for defendant.

Nancy S. Shilepsky (Maria R. Durant, with her), Boston, for plaintiff.

Robert S. Mantell and Kevin G. Powers, Boston, submitted briefs for Massachusetts Chapter of the Nat. Employment Lawyers Ass'n, amicus curiae.

Lynn Hecht Schafran, Deborah Ellis, New York City, and Sydelle Pittas, Carolyn Burt, Amy Drachman and Gretchen Kendall, submitted briefs for Women's Bar Ass'n, amicus curiae.

Mary L. Bonauto, Jamaica Plain, submitted briefs for Gay & Lesbian Advocates & Defenders, amicus curiae.

Ozell Hudson, Jr., Barbara J. Dougan, Louis A. Rodrigues and Priscilla E. Johnson, Boston, submitted briefs for Lawyers' Committee for Civil Rights Under Law of the Boston Bar Ass'n & others, amicus curiae.

Ann M. Kappler and Jodie L. Kelley,

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[1]Pursuant to a settlement agreement, claims originally filed by the plaintiff against the commissioner of the Department of Public Welfare and three individual defendants, not including the defendant, were dismissed on December 18, 1991.

Washington, DC, submitted briefs for Feminists for Free Expression, amicus curiae.

Laura R. Handman, William S. Adams and Edward J. Davis, New York City, submitted briefs for Nat'l Writers Union & others, amicus curiae.

George E. O'Brien, submitted briefs for Hotel Employees/Restaurant Employees Intern. Union Local 26, amicus curiae.

Before LIACOS, C.J., and WILKINS, ABRAMS, NOLAN, LYNCH, O'CONNOR and GREANEY, JJ.

ABRAMS, Justice. The defendant, appealing from a judgment that was based in part on his intentional or reckless infliction of emotional distress on the plaintiff, seeks refuge in the fact that at the time of his wrongdoing the plaintiff was a candidate for election to the office of president of their union local. From this, the defendant argues that the First Amendment to the United States Constitution protects him from liability in the absence of proof of actual malice. The defendant's claim fails from its inception because the activity on which liability was based was, on the

defendant's own admission, not intended to influence the union election. The Supreme Court has distinguished plaintiffs' claims for defamation or intentional infliction of emotional distress on the basis of the plaintiffs' prominence with regard to public controversies relevant to their causes of action. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 342, 94 S.Ct. 2997, 3008, 41 L.Ed.2d 789 (1974). Because there was no evidence of a public controversy, the plaintiff was neither a public figure nor a limited purpose public figure.

After the election, the plaintiff sought recovery on four related claims: one count of intentional infliction of emotional distress; one count of reckless infliction of emotional

distress;[2] and two claims under the Massachusetts Civil Rights Act (MCRA), G.L. c. 12, § 11I (1992 ed.).[3] After a jury-waived trial, judgment was entered in favor of the plaintiff, and damages were awarded in the amount of $35,000. The trial judge ruled that "any one of the plaintiff's claims ... [was] a sufficient basis" for the $35,000 judgment, but refused to award "duplicative" damages. The

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[2]The elements of a cause of action for reckless infliction of emotional distress are the same as those for intentional infliction of emotional distress. Thus, our discussion of the latter applies equally to the former cause of action.

[3]The plaintiff alleged that the defendant's actions violated her right to run for union office and her right to be free from sexual harassment. General Laws c. 12, § 11I (1992 ed.), provides in relevant part: "Any person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, has been interfered with, or attempted to be interfered with, as described in [§] 11H, may institute and prosecute in his own name and on his own behalf a civil action for injunctive and other appropriate equitable relief as provided for in said section, including the award of compensatory money damages...."

defendant appeals. We transferred the case to this court on our own motion. We conclude that the judgment based on the tort claim of intentional or reckless infliction of emotional distress should be affirmed.[4]

I. Facts. At the time of the incident which gave rise to this litigation, the plaintiff, Sylvia Smith Bowman, was a sixty year old supervisor in the Worcester office of the Department of Public Welfare (department). She began working as a social worker for the department in 1967, and was a longstanding and active member of Local 509 of the Service Employees International Union (union). In the 1987 union election, the plaintiff challenged

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[4]The defendant also claimed that the evidence was insufficient to support the judgment in the plaintiff's favor under the Massachusetts Civil Rights Act. The distribution of the two photocopies did not constitute a threat, intimidation, or coercion as defined by the MCRA. We vacate the judgment to the extent that it is based on any violation of the MCRA.

the incumbent president of the local chapter of the union.

In October, 1987, while the plaintiff was on an approved leave to campaign in the union election, the defendant, David Heller, an employee in the plaintiff's office who supported the incumbent president, created two distinct photocopied representations of the plaintiff by superimposing a photograph of her face and name on two different photographs of women striking lewd or masturbatory poses. The photograph of the plaintiff's face was taken from a campaign card she had distributed to union members. The photographs on which the defendant superimposed the plaintiff's face were taken by the defendant from pornographic magazines. In one of the photographs, the model is nude from the waist down, except for garters, and is posed toward the camera with her legs wide apart as she holds

a banana next to her exposed breast. In the other photograph, the model is entirely naked, and appears to be engaged in masturbation. The representations were crafted by the defendant during regular office hours and reproduced on photocopiers owned by the department. The defendant then distributed his handiwork to five coworkers in the Worcester office. Subsequently, the representations were reproduced by employees other than the defendant and distributed to a wider office audience.

The trial judge credited the defendant's claim that, in distributing the caricatures, "it was not his intent to sway votes or to induce people not to vote for [the plaintiff]," and that he sought to make the plaintiff "look ridiculous." The trial judge also credited Heller's statement that he wanted "[t]o make sure they wouldn't be seen by [the plaintiff],"

because they were "a private satire among a select group of friends."

When the plaintiff returned to the office from her campaign leave in November, 1987, she learned of the sexually explicit nature of the photocopies and their distribution throughout the office. The defendant made various allegations that the plaintiff harbored a desire for revenge, and that she made various crude references to men in general and the defendant in particular.

The trial judge found that once the plaintiff saw the pictures she was "shocked" and experienced severe stress, crediting her testimony that she felt "degraded, publicly humiliated, and vulnerable upon seeing the photocopies; [and that] she also felt that the matter was too serious for her to remain silent." The judge also credited the testimony

of an expert who explained the sequelae associated with posttraumatic stress disorder (PTSD) and opined that the plaintiff suffered from PTSD and that the trauma of being represented in the workplace in the compromising caricatures created by a coworker was the cause. According to the record, the plaintiff had to undergo, and still is undergoing, psychological therapy for PTSD. The trauma of the event had a negative impact on her ability to function as productively as she had for many years at her job.[5] The judge found that this trauma was unrelated to the plaintiff's loss in the union election.

As a result of her distress about the photocopies, the plaintiff filed formal complaints with department administrators and

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[5]Pursuant to the settlement agreement between the plaintiff and the department, the plaintiff no longer works for the department.

the union. The department officials determined that the defendant's conduct was sexually harassing, reprimanded the defendant, and explained to the plaintiff that "the production and limited distribution of sexually explicit material by [the defendant] which contained a reproduction of your facial features ... subjected [you] to highly improper and unacceptable behavior which constituted sexual harassment." The union trial board concluded that the defendant's conduct was unbecoming to a union member. The union's determination resulted in a public apology by the defendant to the plaintiff.

Subsequently, the plaintiff filed her tort claims, and amended her complaint to add her statutory claims. The defendant filed counterclaims alleging the plaintiff had defamed him. The trial judge allowed the plaintiff's

motion for summary judgment on the defendant's counterclaims. The defendant did not appeal the disposition of his counterclaims. Those claims are not before us.[6]

II. The plaintiff is neither a public figure nor a limited purpose public figure. The trial judge ruled that the plaintiff was a public figure because she voluntarily became

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[6]The defendant does not challenge the trial judge's findings of fact or the sufficiency of the evidence on the elements of the torts of intentional and reckless infliction of emotional distress. See Boyle v. Wenk, 378 Mass. 592, 392 N.E.2d 1053 (1979); Agis v. Howard Johnson Co., 371 Mass. 140, 144-145, 355 N.E.2d 315 (1976). The judge found that the defendant's actions in creating and distributing the photocopies at work were extreme and outrageous, e.g., outside all reasonable bounds of civilized society, were aimed intentionally at causing, and actually did cause, the plaintiff severe emotional harm. We review the judge's findings of fact to determine whether they are clearly erroneous. See Powers v. Freetown-Lakeville Regional Sch. Dist. Comm., 392 Mass. 656, 659, 467 N.E.2d 203 (1984); Marlow v. New Bedford, 369 Mass. 501, 508, 340 N.E.2d 494 (1976). See also Mass.R.Civ.P. 52(a), 365 Mass. 816 (1974). Conclusions of law are not set aside by a reviewing court unless inconsistent with applicable law. See Powers, supra; Marlow, supra. We conclude that there is neither error of fact nor a mistake of law in the trial judge's findings and order on these tort claims.

involved in the local union election. See Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988). Whether the plaintiff is a public figure is a question of law. See Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 165-169, 99 S.Ct. 2701, 2706-2708, 61 L.Ed.2d 450 (1979); Materia v. Huff, 394 Mass. 328, 331, 475 N.E.2d 1212 (1985). The Supreme Court has said that an individual plaintiff's status is context-dependent and thus determined "by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the [tort liability]." Gertz v. Robert Welch, Inc., 418 U.S. 323, 352, 94 S.Ct. 2997, 3013, 41 L.Ed.2d 789 (1974). "Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public

personality for all aspects of [her] life." Id. The fame required for an individual to be a public figure for all purposes, as opposed to a limited purpose public figure, is very great; the individual must be a "household name" on a national scale. Tavoulareas v. Piro, 817 F.2d 762, 772 (D.C.Cir.), cert. denied, 484 U.S. 870, 108 S.Ct. 200, 98 L.Ed.2d 151 (1987) (although plaintiff was "highly prominent individual, especially in business circles," he was not a general purpose public figure for "all aspects" of his life where his "celebrity in society at large [did] not approach that of a well-known athlete or entertainer--apparently the archetypes of the general purpose public figure"). The plaintiff clearly is not a general purpose public figure.

The Federal Circuit Courts of Appeal have developed various tests to aid judges in

applying the two-prong limited purpose public figure standard set forth in Gertz.[7] See, e.g., Clyburn v. News World Communications, Inc., 903 F.2d 29, 31 (D.C.Cir.1990) (applying test for limited purpose public figure first set forth in Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1296-1298 (D.C.Cir.), cert. denied, 449 U.S. 898, 101 S.Ct. 266, 66 L.Ed.2d 128 (1980): "(1) that there have been a public controversy; (2) that the plaintiff have played a sufficiently central role in the controversy; and (3) that the alleged defamatory statement have been germane to the plaintiff's

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[7]Gertz established the two-pronged analysis to determine if an individual is a limited public figure. First, a "public controversy" must exist. Gertz v. Robert Welch, Inc., 418 U.S. 323, 345, 94 S.Ct. 2997, 3009-10, 41 L.Ed.2d 789 (1974). Second, "the nature and extent of the individual's participation in the particular controversy" must be ascertained. See Clark v. American Broadcasting Co., Inc., 684 F.2d 1208, 1218 (6th Cir.1982), cert. denied, 460 U.S. 1040, 103 S.Ct. 1433, 75 L.Ed.2d 792 (1983).

participation in the controversy");[8] Silvester v. American Broadcasting Cos., Inc., 839 F.2d 1491, 1493 (11th Cir.1988) (adopting Waldbaum three-part limited purpose public figure test); Lerman v. Flynt Distrib. Co., Inc., 745 F.2d 123, 136-137 (2d Cir.1984), cert. denied, 471 U.S. 1054, 105 S.Ct. 2114, 85 L.Ed.2d 479 (1985) (requiring a defendant to show that the plaintiff has: "(1) successfully invited public attention to his views in an effort to influence others prior to the incident that is the subject of litigation; (2) voluntarily injected himself into a public controversy related to the subject of the litigation; (3) assumed a position of prominence in the public controversy; and (4) maintained regular and continuing access to the

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[8]On the view we take of the issues, we need not decide if the defendant's cartoons were germane to the plaintiff's participation in the union election.

media"); Contemporary Mission, Inc. v. New York Times Co., 842 F.2d 612, 617 (2d Cir.), cert. denied sub nom. O'Reilly v. New York Times Co., 488 U.S. 856, 109 S.Ct. 145, 102 L.Ed.2d 117 (1988); Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 590 (1st Cir.1980) ("first task" is to determine "the sort of public controversy referred to in Gertz"). Courts must determine if there is a public controversy because of the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it should include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." New York Times Co. v. Sullivan, 376 U.S. 254, 270, 84 S.Ct. 710, 721, 11 L.Ed.2d 686 (1964).

Because most cases involve media defendants reporting on controversies of interest to the

public, the courts have had little difficulty in recognizing public controversies in most of the limited purpose public figure cases, and thus they have ruled that the plaintiffs had limited purpose public status. Of course, media attention does not alone transform a private controversy into a public one, Time, Inc. v. Firestone, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976), and the attention that a defendant's alleged wrong itself generates does not create a public controversy necessary for limited purpose public figure status. See Hutchinson v. Proxmire, 443 U.S. 111, 135, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979) ("Clearly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure").

The defendant does not claim that the election contest received any public attention.

There was no basis for concluding the result of the election contest would be felt by persons who were not participants in the union election. The election in this case had no more public controversy than the usual election of a president of a social club or an election to the governing board of an educational institution, to the directorship of a corporation, or to the governing body of a condominium association (see, e.g., Sewell v. Eubanks, 181 Ga.App. 545, 546, 352 S.E.2d 802 [1987]).

The fact that the controversy was a union election does not provide an automatic basis for deciding for First Amendment purposes that there was a public controversy.[9] The defendant makes

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[9]The defendant does not argue that there was an issue of public concern in the union election. We have not found any case other than Materia v. Huff, 394 Mass. 328, 475 N.E.2d 1212 (1985), in which the mere fact of involvement in a local union election was sufficient to establish the limited purpose public figure status of an otherwise private individual. See generally Annot., Who is a "Public

no claim that Federal statutory or regulatory law preempts State tort law when a union election is involved. See Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 273, 94 S.Ct. 2770, 2775-76, 41 L.Ed.2d 745 (1974); Linn v. United Plant Guard Workers of Am., Local 114, 383 U.S. 53, 65, 86 S.Ct. 657, 664, 15 L.Ed.2d 582 (1966); 29 U.S.C. § 413 (1988). If all candidates for office in a union, particularly a union of State employees, are to be treated automatically as limited purpose public figures, the standard that courts have been following in determining that status will have to be abandoned. In sum, the plaintiff was not a limited purpose public figure because the

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Figure" for Purposes of Defamation Action, 19 A.L.R.5th 1 (1994). The cases cited by the dissent all have public aspects which are not present in this case.

circumstances did not involve a public controversy. [10]

Even if the election had received some public attention, "[a] private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention." Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 167, 99 S.Ct. 2701, 2707, 61 L.Ed.2d 450 (1979). "It is speech on 'matters of public concern' that is 'at the heart of the First Amendment's protection.'... In contrast, speech on matters of purely private concern is of less First

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[10]The defendant phrases his defense to the plaintiff's claim under the "First and Fourteenth Amendments to the United States Constitution and in arts. 9, 16, and 19 of the Massachusetts Declaration of Rights." We reject the defendant's argument that art. 9, as interpreted in Batchelder v. Allied Stores Int'l, Inc., 388 Mass. 83, 445 N.E.2d 590 (1983), provides him broader protection than the First Amendment in these circumstances. On the facts before us, we decline to extend the protection of arts. 9, 16, and 19 to the circumstances of this case.

Amendment concern." (Citations omitted.) Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758-759, 105 S.Ct. 2939, 2944-2945, 86 L.Ed.2d 593 (1985). In Dun & Bradstreet, the Supreme Court followed the standard for determining whether an issue was of public concern set forth in Connick v. Myers, 461 U.S. 138, 147-148, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983) ("Whether ... speech addresses a matter of public concern must be determined by the [expression's] content, form, and context ... as revealed by the whole record"), holding that a credit report was not of public concern. In addition, the Court noted that the report was available confidentially to only five subscribers and thus the information was not vital to "the free flow of commercial information." Dun & Bradstreet, supra 472 U.S. at 762, 105 S.Ct. at 2947. Thus, the Court

concluded that no "special protection" was required for the credit reports "to ensure that 'debate on public issues [will] be uninhibited, robust, and wide-open.' " Id.[11] The imposition of tort liability in circumstances where the record does not disclose a public controversy is not prohibited.

The defendant argues that the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 411(2), provides the defendant, as a union member, with "extraordinarily broad

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[11]Earlier decisions had left open the question of the constitutional significance of speech about purely private issues. See, e.g., Monitor Patriot Co. v. Roy, 401 U.S. 265, 275, 91 S.Ct. 621, 627, 28 L.Ed.2d 35 (1971) (in context of political campaigns, question left open "whether there remains some exiguous area of defamation against which a candidate may have full recourse" for reputational damage); Time, Inc. v. Hill, 385 U.S. 374, 391, 87 S.Ct. 534, 544, 17 L.Ed.2d 456 (1967) (because "[d]ifferent considerations might arise concerning the degree of 'waiver' of the protection the State might afford" under a privacy statute, Court left open "the question whether the same [First Amendment] standard should be applicable both to persons voluntarily and involuntarily thrust into the public limelight").

freedoms." We believe that the defendant mistakenly relies on decisions under the National Labor Relations Act, such as Marshall v. Local Union No. 815, United Textile Workers, 479 F.Supp. 613 (E.D.Tenn.1979); and Rollison v. Hotel, Motel, Restaurant, & Constr. Camp Employees, Local 879, 677 F.2d 741 (9th Cir.1982). The defendant does not argue that the statute is applicable. If the statute is not applicable, "[t]he test for preemption of a tort claim is whether the [S]tate 'confers nonnegotiable [S]tate-law rights on employers or employees independent of any right established by contract, or, instead, whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract.' " Young v. Anthony's Fish Grottos, Inc., 830 F.2d 993, 999 (9th Cir.1987), quoting Allis-Chalmers Corp. v. Lueck, 471 U.S. 202,

213, 105 S.Ct. 1904, 1912, 85 L.Ed.2d 206 (1985). On this record, there is no union contract involved. The defendant does not assert that the plaintiff's tort claims are "inextricably intertwined with the terms of the labor contract." Id. The record does not support any such claim.

III. Conclusion. We conclude that the defendant's speech was not entitled to constitutional protection because there was no public controversy. Further, because the defendant did not intend to influence the union election, the imposition of liability for the defendant's speech does not chill constitutional rights of free speech.

Judgment affirmed.

NOLAN, Justice (dissenting, with whom LYNCH, J., joins).

I disagree with the court's holding that the plaintiff was not a limited purpose public figure because the union election was not a public controversy. I conclude that the plaintiff became a limited purpose public figure when she voluntarily thrust herself into the election campaign. I also conclude that the caricatures at issue addressed the plaintiff's campaign for the presidency, despite their horrid content. As a result, I would use the "actual malice" standard of liability in determining whether the plaintiff should recover on her claim of intentional infliction of emotional distress.[1] Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56, 108 S.Ct. 876, 882, 99

[1]Under the actual malice standard, the plaintiff must prove that the speech was false and that the speaker either had knowledge of the falsity or had acted with reckless disregard of the truth. See Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56, 108 S.Ct. 876, 882, 99 L.Ed.2d 41 (1988).

L.Ed.2d 41 (1988). Thus, because the plaintiff has failed to prove that the caricatures contained a false statement of fact, I dissent.

In reviewing the trial judge's finding of liability on the plaintiff's claim of intentional infliction of emotional distress, we must "make an independent examination of the whole record" in order to insure "that the judgment does not constitute a forbidden intrusion on the field of free expression." New York Times Co. v. Sullivan, 376 U.S. 254, 285, 84 S.Ct. 710, 729, 11 L.Ed.2d 686 (1964). Having reviewed the entire record, I am compelled to disagree with the court's conclusion that the plaintiff was not a limited purpose public figure. This court decided precisely this issue in Materia v. Huff, 394 Mass. 328, 475 N.E.2d 1212 (1985), where we held that the plaintiff was a limited purpose public

figure as a matter of law because he "voluntarily thrust himself into the controversy by campaigning for reelection to the position of secretary-treasurer of Local 526." Id. at 331, 475 N.E.2d 1212. Nevertheless, today the court decides that an election campaign for the presidency of a union local is not a public controversy. In support of this decision the court states that "[t]here was no basis for concluding [that] the result of the election contest would be felt by persons who were not participants in the union election." Ante at 374. The court continues in this vein stating that "[t]he election in this case had no more public controversy than the usual election of a president of a social club or an election to the governing board of an educational institution, to the directorship of a corporation, or to the governing body of a condominium association."

Ante at 374.

These conclusions are in reference to the first prong of the three part test for determining whether an individual is a limited purpose public figure, set forth in Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1297-1298 (D.C.Cir.), cert. denied, 449 U.S. 898, 101 S.Ct. 266, 66 L.Ed.2d 128 (1980). The first prong, which addresses the issue whether there is a public controversy, requires the reviewing court to "ask whether a reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution. If the issue was being debated publicly and if it had foreseeable and substantial ramifications for non-participants, it was a public controversy." (Footnote omitted.) Id. at 1297.

In my opinion, an election is the absolute

paradigm of a public controversy. The "immediate participants" in this union election campaign, the candidates, would not have been the only persons to have felt the impact of the election. Instead, the election would have had an effect on each of the 8700 members of Local 509.[2] In addition, the Supreme Court of the United States has stated repeatedly that the public has an interest in labor unions in general and in union elections in particular. See Wirtz v. Local Union No. 125, Laborers' Int'l Union of N. Am., 389 U.S. 477, 483, 88

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[2]I also think that the court has failed to consider the increased level of public interest that is implicated in this case where many members of Local 509 were State workers who were employed by the Department of Welfare. As employees of the State, their salaries were paid with State tax dollars. The court's comparison, therefore, between a union election and an election in a social club or the governing body of a condominium association is particularly ill-conceived in this case. Both a social club and a condominium association are purely private organizations created to protect the private entertainment or the private property interests of their members.

S.Ct. 639, 642, 19 L.Ed.2d 716 (1968) (noting that the public has an interest in labor union elections); Wirtz v. Local 153, Glass Bottle Blowers Ass'n of the U.S. & Can., 389 U.S. 463, 475, 88 S.Ct. 643, 650, 19 L.Ed.2d 705 (1968) (stating that "Congress [has] emphatically asserted a vital public interest in assuring free and democratic union elections"); Thornhill v. Alabama, 310 U.S. 88, 102-103, 60 S.Ct. 736, 744, 84 L.Ed. 1093 (1940) (stating that labor relations are not matters of mere local or private concern). See also National Ass'n of Gov't Employees v. National Fed'n of Fed. Employees, 844 F.2d 216, 220 (5th Cir.1988) (indicating that the labor union election campaigns are a matter of public concern). Based on this authority, I conclude that the election campaign for the presidency of Local

509 was a public controversy.[3] The plaintiff, therefore, became a limited purpose public figure when she voluntarily thrust herself into the election campaign for the presidency of Local 509.[4] See Materia v. Huff, supra at 331,

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[3]If, however, the election was not a public controversy in relation to the public at large, it was certainly a public controversy in relation to the members of Local 509. See Materia v. Huff, supra at 331, 475 N.E.2d 1212 (stating that "the plaintiff's status as a public figure is determined in relation to those [union] members, rather than to the community at large"); Walko v. Kean College of New Jersey, 235 N.J.Super. 139, 152, 561 A.2d 680 (1988) (deciding that a college administrator was a public figure within the college community). Indeed, the plaintiff had communicated directly with many of the members of Local 509 while campaigning for the presidency. In 1987, the plaintiff spent a total of forty-five days visiting most of the four hundred union work sites throughout the State. She also mailed thousands of campaign postcards to the homes of members of Local 509. Thus, it is clear that the plaintiff enjoyed broad access to channels of communication in her effort to generate support for her campaign. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 345, 94 S.Ct. 2997, 3009-10, 41 L.Ed.2d 789 (1974) (stating that a plaintiff's access to channels of effective communication is an important consideration in determining whether he is a public figure).

[4]Many other courts have concluded that union officers are limited public figures. See Miller v. Transamerican Press, Inc., 621 F.2d 721, 724 (5th Cir.), S.C., 628 F.2d 932 (5th Cir.1980), cert.

475 N.E.2d 1212. See also Jean v. Dugan, 20 F.3d 255, 262 n. 7 (7th Cir.1994).

Speech concerning a limited purpose public figure will qualify for the actual malice standard set forth in New York Times Co. v. Sullivan, supra 376 U.S. at 279-280, 84 S.Ct. at

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denied, 450 U.S. 1041, 101 S.Ct. 1759, 68 L.Ed.2d 238 (1981) (deciding that high ranking official of Teamsters union was a limited public figure); Guam Fed'n of Teachers, Local 1581 v. Ysrael, 492 F.2d 438, 439 (9th Cir.), cert. denied, 419 U.S. 872, 95 S.Ct. 132, 42 L.Ed.2d 111 (1974) (noting that officers of a teachers' union were public figures); Henry v. National Ass'n of Air Traffic Specialists, 836 F.Supp. 1204, 1206 n. 3, 1211 n. 6 (D.Md.1993), aff'd without opinion, 34 F.3d 1066 (4th Cir.1994) (stating that elected union leaders of 1,700-member union were public figures); Batson v. Shiflett, 325 Md. 684, 722, 728, 602 A.2d 1191 (1992) (plaintiff who was elected president of union local was a public figure); Miles v. Perry, 11 Conn.App. 584, 592 n. 7, 529 A.2d 199 (1987) (noting that union officers are generally considered public figures for purposes of union business); Lins v. Evening News Ass'n, 129 Mich.App. 419, 432, 342 N.W.2d 573 (1983) (deciding that union officers were limited public figures); City Firefighters Union, Local 28 v. Duci, 104 Misc.2d 498, 503 n. 7, 428 N.Y.S.2d 772 (1976) (concluding that union officers are public figures). See also Hanlon v. Davis, 76 Md.App. 339, 357, 545 A.2d 72 (1988) (noting that trial court judge instructed jury that president of union was a public figure).

725-726, only if that speech addresses the public controversy into which the limited purpose public figure has voluntarily injected herself. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 351, 94 S.Ct. 2997, 3012-13, 41 L.Ed.2d 789 (1974). See also Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1298 (D.C.Cir.), cert. denied, 449 U.S. 898, 101 S.Ct. 266, 66 L.Ed.2d 128 (1980) (stating that the alleged defamation must have been "germane" to the limited purpose public figure's participation in the controversy). If, however, the contested speech does not address the controversy into which the limited purpose public figure has thrust herself, then the States may impose liability "on a less demanding showing than that required by New York Times Co. [v. Sullivan]," as long as they do not impose liability without fault. Gertz v. Robert Welch,

Inc., supra 418 U.S. at 347-348, 94 S.Ct. at 3010-3011. "Whether ... speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." Connick v. Myers, 461 U.S. 138, 147-148, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983). After reviewing the entire record and considering the content, form, and context of the caricatures, I am compelled to conclude that the speech in this case addressed a matter of public concern--the plaintiff's candidacy for the presidency of Local 509.[5] See Connick v. Myers,

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[5]The court has placed great emphasis on what it terms as "the defendant's own admission [that he] did not intend to influence the union election." Ante at 371. In my opinion, the defendant has done no such thing. He testified that he "was trying to state that [the plaintiff's] statements during the campaign were ridiculous." The defendant stated also that the caricatures "were the most absurd pictures that I could think of, and [the plaintiff's] views were the most absurd I could think of." In addition, the defendant stated that "[t]he picture was not to be of any sexual nature, except of [the plaintiff] as a political candidate.

supra 461 U.S. at 147-148, 103 S.Ct. at 1690. Although I find the content of the caricatures to be totally repulsive, even "the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth." Linn v. United Plant Guard Workers of Am., Local 114, 383 U.S. 53, 63, 86 S.Ct. 657, 663, 15 L.Ed.2d 582 (1966). As a result, liability for intentional infliction of emotional distress should be imposed on the defendant only if the plaintiff can prove by clear and convincing evidence that the caricatures contained a false statement of fact

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I wanted to kind of degrade her as a political candidate, but that's it." Furthermore, the defendant testified that he was not attempting to discourage people from voting for the plaintiff simply because he believed that they already had decided not to vote for her. Finally, both the plaintiff and other union members recognized that the caricatures were related to the union election. Thus, it is clear to me that the defendant intended to lampoon the plaintiff's candidacy with his caricatures.

and that the defendant had knowledge of the falsity or had acted with reckless disregard of the truth. See Hustler Magazine, Inc. v. Falwell, supra 485 U.S. at 56, 108 S.Ct. at 882.

Even if the plaintiff was a private figure, despite her entering the election campaign for the presidency of Local 509, the actual malice standard remains the appropriate standard to use in this case. See Batson v. Shiflett, 325 Md. 684, 728, 602 A.2d 1191 (1992); McKinnon v. Smith, 52 Misc.2d 349, 352, 275 N.Y.S.2d 900 (1966). The Supreme Court of the United States has used the actual malice standard in free speech cases involving unions because "federal policies favor[ ] uninhibited, robust, and wide-open debate in labor disputes." Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 273, 94 S.Ct. 2770, 2776, 41 L.Ed.2d 745 (1974) [Letter

Carriers]. The Supreme Court has recognized that "exaggerated rhetoric was commonplace in labor disputes and protected by federal law." Id. at 286, 94 S.Ct. at 2782. Therefore, in order to avoid "unwarranted intrusion upon free discussion" in labor disputes, the Court adopted by analogy the actual malice standard used in New York Times Co. v. Sullivan, supra 376 U.S. at 279-280, 84 S.Ct. at 725-726. Linn v. United Plant Guard Workers, supra 383 U.S. at 65, 86 S.Ct. at 664. As a result, the Supreme Court held that Federal labor policy preempts State libel actions for defamatory statements, made in the course of a labor dispute, which were published without knowledge of their falsity or with reckless disregard for the truth. See id. Subsequently, in Letter Carriers, the Supreme Court rejected the argument that the actual malice standard applied only in the context of

a labor-management dispute or a representation campaign. See Letter Carriers, supra at 278-279, 94 S.Ct. at 2778.[6] Instead, the Supreme Court reasoned that "application [of the actual malice standard] of Linn [v. United Plant Guard Workers] must turn on whether the defamatory publication is made in a context where the policies of the federal labor laws leading to protection for freedom of speech are significantly implicated." Letter Carriers, supra 418 U.S. at 279, 94 S.Ct. at 2778.

In the present case, the Labor Management Reporting and Disclosure Act (LMRDA) is the relevant federal law because the controversy

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[6]Although the labor-management relations system in Letter Carriers was established by an Executive Order and not the National Labor Relations Act (NLRA), the Supreme Court dismissed the distinction stating that, "the same federal policies favoring uninhibited, robust, and wide-open debate in labor disputes are applicable" in both cases. Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 277, 94 S.Ct. 2770, 2777-2778, 41 L.Ed.2d 745 (1974).

arose in the context of union officer elections.[7] See Petersen v. Dole, 956 F.2d 1219, 1223 (D.C.Cir.1992); 29 U.S.C. § 481 (1988). "[T]he [LMRDA's] overriding objective was to ensure that unions would be democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections." Finnegan v. Leu, 456 U.S. 431, 441, 102 S.Ct. 1867, 1873, 72 L.Ed.2d 239 (1982). Congress "recognized that democracy would be assured only if union members are free to discuss union policies and criticize the

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[7]The LMRDA governs, inter alia, "mixed" labor unions. See Celli v. Shoell, 40 F.3d 324, 327 (10th Cir.1994). A "mixed" union has members that are working for private employers and members that are working for either the Federal government or the State. Id. In the present case, the plaintiff and defendant were both members of Local 509 of the Service Employees International Union. The local was comprised of both State workers and workers in private agencies. In addition, the local was part of the "Alliance," which was the "recognized bargaining agent" for the local. Thus, it is likely that the Local 509 is subject to the LMRDA, despite the paucity of clarity in the record.

leadership without fear of reprisal. Congress also recognized that this freedom is particularly critical, and deserves vigorous protection, in the context of election campaigns. For it is in elections that members can wield their power, and directly express their approval or disapproval of the union leadership." United Steelworkers of Am. v. Sadlowski, 457 U.S. 102, 112, 102 S.Ct. 2339, 2346, 72 L.Ed.2d 707 (1982). Thus, a claim for intentional infliction of emotional distress, in the context of a union election, implicates the same federal labor policies leading to the protection of freedom of speech as in Linn v. United Plant Guard Workers, supra 383 U.S. at 65, 86 S.Ct. at 664, and Letter Carriers, supra 418 U.S. at 279, 94 S.Ct. at 2778. See Henry v. National Ass'n of Air Traffic Specialists, supra at 1211; Ross v. Duke, 116 Ariz. 298, 300-301,

569 P.2d 240 (1977).

By imposing an outrageousness standard on union election speech, today's decision will permit a candidate for a union office to seek damages for emotional distress from fellow union members who "say naughty things during [election campaigns]." Linn v. United Plant Guard Workers, supra 383 U.S. at 67, 86 S.Ct. at 665 (Black, J., dissenting). The Supreme Court has recognized the dangerously chilling effect of such a standard on free speech stating that "'[o]utrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An 'outrageousness' standard thus runs afoul of our longstanding refusal to allow damages to be awarded because

the speech in question may have an adverse emotional impact on the audience." Hustler Magazine, Inc. v. Falwell, supra 485 U.S. at 55, 108 S. Ct. at 882. It is unavoidable, therefore, that the court's imposition of an outrageousness standard will chill protected speech in the context of a union election. See L. Tribe, American Constitutional Law § 13-26, at 1131-1132 (1988). Thus, to provide "adequate 'breathing space' to the freedoms protected by the First Amendment," the actual malice standard is the appropriate standard to use in the context of a union election. Hustler Magazine, Inc. v. Falwell, supra at 56, 108 S. Ct. at 882. See Beruan v. French, 56 Cal.App.3d 825, 828-829, 128 Cal.Rptr. 869 (1976) (stating that labor union operates like a system of government and strong policies favor the full exercise of the right to free speech in union election

campaigns).

Where the actual malice standard applies, the "sine qua non of recovery ... is the existence of falsehood." Letter Carriers, supra 418 U.S. at 283, 94 S.Ct. at 2781. In the present case, the plaintiff has not proved that the caricatures contained a false statement of fact. Accordingly, I dissent.[8]

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[8]Because I agree with the court's decision to vacate the judgment on the plaintiff's two civil rights claims, ante at 372, I would reverse the entire judgment in favor of the defendant.

Sylvia Smith BOWMAN,[1]
vs.
David HELLER.[1]
Civ. A. No. 90-3269.
Superior Court of Massachusetts.
July 9, 1993.
MEMORANDUM AND ORDER

J. HAROLD FLANNERY, Justice.

The plaintiff, Sylvia Smith Bowman ("Bowman"), is a 66 year old woman who at the time of the incident that gives rise to this action was a Social Work Supervisor in the Worcester Office of the Massachusetts Department of Public Welfare ("the Department"). Bowman worked for the Department from 1967 until August of 1991, when she left pursuant to an

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[1][Published at 66 Fair Empl.Prac.Cas. (BNA) 194, 10 IER Cases 1292;1993 WL 761159 (Mass.Super.).]

[1]The original defendants to this action, with the exception of David Heller, entered into a Settlement Agreement with the plaintiff; the action was therefore dismissed as to them pursuant to the "Agreement for Judgment" adopted and ordered by this court (Dortch, J.) on December 18, 1991.

agreement. The defendant, David Heller ("Heller"), worked at the same Worcester Office at all times relevant to this matter, and continues to work for the Department. Throughout the summer and fall of 1987, Bowman was running for the presidency of Local 509 of the Service Employees International Union ("the Union"). On or about October 23, 1987, Heller prepared and distributed to various co-employees two photocopies of caricatures depicting Bowman's head and name, taken from her campaign postcard, superimposed over nude and partially nude female bodies ("the photocopies"). Heller was suspended from his employment for one week, from April 25 to April 29, 1988, as a result of this incident. Bowman now sues Heller for intentional infliction of emotional distress (Count IV), reckless infliction of emotional distress (Count V), and violation of her right

to run for Union office and to be free from sexual harassment pursuant to the Massachusetts Civil Rights Act (Counts VII and XIII).

On or about January 12, 1988, Bowman posted in the Worcester Welfare Office a document titled "Charges Against David Heller" (the "Charges") which she had previously photocopied onto Union stationary. The Charges were those brought by Arthur Casey, a Vice President of the Union, against Heller on Bowman's behalf. A month later, on or about February 11, 1988, Bowman prepared a memorandum to her immediate supervisor regarding sicktime she was planning to take which referenced Heller and the photocopies incident (the "Sicktime Memo"). Heller asserts in his counterclaims against Bowman that these two documents were defamatory.

The plaintiff's claims and defendant's

counterclaims were tried jury waived from April 5 to April 14, 1993. On the basis of the evidence, which consisted of 34 exhibits[2] and the testimony of twelve witnesses, I make the following findings and rulings pursuant to Mass.R.Civ.P. 52(a).

Bowman graduated from Vassar in 1949 and worked in various companies holding managerial positions before she became a social worker for the Massachusetts Department of Public Welfare in 1967. She was promoted to supervisor in 1970, and worked in such capacity until she left the Department in August of 1991 pursuant to the agreement referred to in note 1, above. During most of her career as a social worker, Bowman was also active in Local 509 of the

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[2]There are various gaps in the numerical sequence of the individual exhibits as a result of counsel's request that official exhibit numbers correspond to their previous numbering systems.

Service Employees International Union whose members include social workers in the Department and other state employees. At various times from 1967 to 1987 Bowman served in a number of Union offices, including Statewide Recording Secretary, Trustee, Vice President of the Worcester Region's Welfare Chapter, Joint Board Member, Executive Board Member, Trial Board Delegate, and Steward.

In 1987 Bowman decided to make a second run for the presidency of the Union (her first attempt in 1985 having been unsuccessful), and she campaigned actively throughout the summer and fall of that year. Heller opposed Bowman's candidacy, supporting instead the incumbent president, Fred Trusten. Heller worked on Trusten's campaign by passing out campaign literature and his own written endorsement of Trusten to his co-workers (ex. 27, 28).

On or about October 23, 1987, during the election campaign period, Heller prepared and distributed two photocopies of nude and partially nude female bodies in sexually explicit poses, superimposed with Bowman's face and name taken from her campaign postcard (ex. 3A, 3B). One photocopy depicted Bowman in a masturbatory position, completely nude, and the other depicted her partially nude, holding a banana, with her legs spread apart to expose her genitals. The original photographs (prior to their alteration by Heller) were taken from a pornographic magazine. Heller's preparation and distribution of these photocopies took place at work during working hours, and with the use of office photocopy equipment. Heller either gave or showed the photocopies to at least five co-workers: Richard Williamson, Victor Lempicki, Scott Butler, Kenneth Saunders, and

Bowman's campaign treasurer, Jeanne Lacey. It was Heller's practice to create and distribute "satirical" paste-up photocopies around the office (ex. 5A-5E). In addition, he would often display such photocopies by hanging them up on his cubicle walls. With the photocopies of Bowman, however, Heller did not hang them on his walls and, according to his testimony, he gave or showed them only to people he thought would appreciate their "off-color" humor. Heller testified repeatedly that his intent was to make Bowman "look ridiculous", as ridiculous as he felt her ideas were during the Union election campaign. Heller also testified, however, that it was not his intent to sway votes or to induce people not to vote for Bowman.

While comics, jokes, and satirical pictures circulated regularly in the Worcester Welfare

Office, the testimony of several witnesses established that the photocopies of Bowman stood apart from the rest both in terms of their sexually explicit content and their focus on a specific co-worker from the same office. Heller himself had never before used pornographic pictures for his paste-up creations (featuring men for the most part). Given the nature of the Bowman photocopies and the office practice of circulating "humorous" material, it is fairly inferable from the evidence, and so I find, that Heller was aware when distributing the photocopies that Bowman would be upset by them if she saw them, and furthermore, that she was substantially certain to see them.

The photocopies of Bowman did indeed achieve circulation beyond those co- workers Heller originally gave them to. For example,

Jeanne Lacey testified that she saw various Department employees making additional copies of the Bowman photocopies, and Susan Caramielo, a witness for the defense, stated that she first saw one or both of the photocopies as they were being passed among a group of Department employees from different floors of the Worcester Office. Ultimately, Scott Butler, one of the people who received the photocopies directly from Heller, in turn gave copies of them to his friend and Bowman's campaign coordinator, John Stockman ("Stockman"). On or about October 26, 1987, Stockman told Bowman about the photocopies and described their contents, but he tried to minimize the situation in order not to distract her from her campaign. He and Bowman decided that she should not see the photocopies until she was done with her active campaigning. Although Bowman asked around the Worcester

Office to determine how widespread the distribution of the photocopies was, she tried to make light of the incident in order to keep the campaign issues focused.

On or about November 18, 1987, after active campaigning for the Union election had ended but before the election results were known, Bowman finally received the photocopies from Stockman. They met at a luncheonette during the morning break from work and Stockman gave the photocopies to her in a sealed envelope, advising her to look at them when she was at home. Bowman opened the envelope once she was alone, however, and experienced such shock that she does not recall clearly what she did afterwards. According to the testimony of Cindy Cardone ("Cardone"), the owner of a bookstore near the luncheonette at the time of this incident, Bowman came into her store that same

morning in great physical and emotional distress, unable to speak or breath normally and perspiring heavily. Cardone feared that Bowman was suffering a heart attack or stroke. When Bowman was finally able to speak, she explained that she had just had a great shock and showed the photocopies to Cardone. Feeling that Bowman needed some privacy to pull herself together, Cardone closed her store for approximately 45 minutes.

Bowman testified to feeling degraded, publicly humiliated, and vulnerable upon seeing the photocopies; she also felt that the matter was too serious for her to remain silent. During the remainder of the day and for the rest of the week, Bowman showed the photocopies to various Department and Union Officials in an effort to elicit some remedial response. As part of this effort, on or about November 19,

1987, Bowman took pictures of Heller and his work station, where he had other paste-up photocopies displayed, in order to identify him as the perpetrator of the photocopies (ex. 21A-21E). One of the pictures she took showed the back of a client's head. Heller complained about Bowman's photograph, and the Department promptly investigated and took disciplinary action against her.

In contrast, the Department was slow and tentative in its response to Bowman's complaint against Heller. The Department conducted no official investigation until late December. On or about December 30, 1987, Heller admitted in a Department interview that he had prepared and distributed the photocopies to five co-workers (ex. 32). On April 1, 1988, the Department notified Bowman that it found Heller's actions regarding the photocopies to constitute sexual

harassment and that it would take appropriate action (ex. 23). Later that month, Heller was suspended from work without pay for five days, to which Heller responded by "grieving" the suspension. On February 15, 1989, almost a year later, Heller made a public, written apology to Bowman (ex. 30). On January 23, 1990, Heller signed a Memorandum of Understanding with the Department agreeing to "reasonably avoid physical and verbal contact" with Bowman in the workplace (ex. 31).

The shock and emotional distress Bowman experienced upon first seeing the photocopies persisted and Bowman was eventually diagnosed as suffering from Post-Traumatic Stress Disorder ("PTSD"). Bowman's current treating psychotherapist, Maureen Lavallee, Ph.D., testified that PTSD is triggered by an event outside the normal range of human experience and

manifests in symptoms such as psychogenic amnesia, disassociation, flashbacks, fearfulness, an exaggerated startle response, psychic numbness, problems with concentration and memory, uncontrollable crying, loss of trust, and loss of interest in formerly pleasurable activities. Dr. Lavallee further testified that although Bowman's past medical and mental health history make her present symptoms more severe, the specific event which caused the PTSD was the photocopies incident. That testimony was essentially uncontradicted. I find that neither the loss of the Union election nor childhood trauma is the cause of Bowman's emotional distress and related symptoms. I find, rather, that Heller's preparation and distribution at work of photocopies which depict Bowman in sexually explicit poses and hold her up to ridicule, an

event outside the normal range of human experience, caused Bowman's emotional distress and PTSD.

Heller's counterclaims of defamation stem from two events. On or about January 12, 1988, Bowman posted in the Worcester Welfare Office the "Charges Against David Heller" (the "Charges") filed with the Union Trial Board (ex. 7). The Charges had been prepared by Bowman and signed by Arthur Casey, a Vice President of the Union, who was bringing the complaint against Heller on Bowman's behalf. The Charges actually filed with the Trial Board were on blank paper, but Bowman copied them onto Union letterhead prior to posting them in the Worcester Office in order to comply with the contractual requirement that anything posted on the Union bulletin board be on Union letterhead (ex. 22). Other than the stationery on which they appeared, the posted

charges were a true copy of the charges as filed. Furthermore, it was a practice of the Union to post charges filed with the Trial Board on the Union bulletin board, as long as the outcome of the trial was also posted.

On or about February 11, 1988, Bowman sent a memorandum (the "Sicktime Memo") to her supervisor, with copies to others who had management or record keeping responsibilities, regarding sicktime she was planning to take (ex. 8). She also gave copies of the memo to various Union officials such as the Union stewards from her office. In the memo, Bowman referred to the photocopies incident as a "sexual assault." I find that Bowman used the term "sexual assault" because of a good faith belief that the term was appropriate to describe the sort of personal attack the photocopies represented, and that those receiving the memo would not have

understood the term to mean an actual crime called sexual assault. In addition, I find that Heller has not established by a preponderance of the evidence that his reputation was injured among a substantial and respectable group of people in his work or residential community with regard to either of the incidents above.

Based on the foregoing facts, I rule as follows on the law.[3] To begin, Bowman's tort claims allege both intentional and reckless infliction of emotional distress (Counts IV and V). According to Massachusetts law, however,

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[3]The plaintiff urges this court to estop defendant Heller from relitigating issues of fact and law already decided in a prior arbitration proceeding which determined that the Department of Public Welfare had just cause to suspend Heller from work as a result of the photocopies incident. S.E.I.U., Local 509 v. Department of Public Welfare (OER ARD # 1078, November 21, 1991). The plaintiff cites Miles v. Aetna Casualty & Surety Co., 412 Mass. 424 (1992), for the proposition that parties may be bound by an arbitration decision under certain circumstances. I do not apply that principle here because I am uncertain whether the arbitration was a full-blown trial of the issues. In any event, my findings agree with those of the arbitrator.

intentional and reckless infliction of emotional distress have essentially the same elements and burdens of proof. See Simon v. Solomon, 385 Mass. 91, 95 (1982); Tilton v. Franklin, 24 Mass.App.Ct. 110, 112 (1987). Thus, in order to hold Heller liable for damages suffered as a result of either, Bowman must show that (1) Heller intended to inflict emotional distress or he knew or should have known emotional distress was the likely result of his conduct; (2) Heller's conduct was extreme and outrageous, beyond all possible bounds of decency and utterly intolerable in a civilized community; (3) Heller's actions were the cause of Bowman's distress; and (4) the emotional distress suffered by Bowman was severe and of a nature that no reasonable person could be expected to endure it. Agis v. Howard Johnson Co., 371 Mass. 140, 144-145 (1976).

By Heller's own admission, his intent in creating and distributing the pornographic photocopies was to ridicule Bowman. For this purpose, he chose to superimpose Bowman's face and name onto images that were particularly suggestive and sexually explicit, reducing Bowman to nothing more than a sexual object. While Heller argues that he never intended or expected Bowman to actually see the photocopies (whatever his intent may have been in creating and distributing them), the fact remains that circulation of non-work related "humorous" material was common practice in the office. Heller was not only well aware of this, he himself initiated such circulation of his other photocopied works on several occasions. Given the immediate notoriety which the Bowman photocopies were certain to achieve, Heller, at the very least, knew or should have known that

Bowman was not only likely to see the photocopies, but was likely to suffer emotional distress as a result.

That Heller's conduct was extreme and outrageous is amply supported by the photocopies themselves. No one who testified from the Worcester Welfare Office, including Heller, could recall another "humorous" picture or photograph passed around which even remotely resembled the Bowman photocopies. Indeed, the kind of gross, personal, and pornographic attack that the photocopies represent is well outside the bounds of decency in a civilized society. During testimony at trial, Dr. Maureen Lavallee, Bowman's treating psychotherapist, also characterized the photocopies incident as a traumatic event outside the normal range of human experience. The second element of the Agis standard is thus satisfied as well.

Dr. Lavallee's uncontradicted medical testimony furthermore established a causal link between Heller's creation and distribution of the photocopies and Bowman's Post-Traumatic Stress Disorder ("PTSD"). While Heller suggests that Bowman's own troubled medical and mental health history mitigates, if not eliminates, any liability on his part, such argument directly contravenes the general tort principle that an actor takes the victim as he finds her. Bowman's medical and mental health history therefore may make her present symptoms more severe, but it does not lessen the causal link between Heller's conduct and Bowman's injuries.

Finally, the severity of Bowman's emotional distress is borne out by the diagnosis of PTSD. Consistent with that diagnosis, Bowman has experienced (and continues to experience) a range of symptoms from psychogenic amnesia, to

an exaggerated startle response, to loss of interest in formerly pleasurable activities. Bowman is still in active treatment and therapy, and according to Dr. Lavallee, such treatment will probably have to continue for several more years.

Even if Bowman has proven all the elements of intentional infliction of emotional distress by a preponderance of the evidence, Heller argues that Hustler Magazine v. Falwell, 485 U.S. 46 (1988), nevertheless precludes Bowman from maintaining this claim against him. In Hustler Magazine Magazine, the Supreme Court held that the First and Fourteenth Amendments prohibit public figures and public officials from recovering damages for intentional infliction of emotional distress based on the publication of caricatures "doubtless gross and repugnant in the eyes of most," without a

further showing that the publication contains a false statement of fact which was made with actual malice. Id.

The applicability of Hustler Magazine 's First Amendment analysis depends initially on whether or not Bowman can be deemed a "public figure." Heller states that by running for the Union presidency, Bowman voluntarily injected herself into a particular public controversy and thereby became a public figure for a limited range of issues. Gertz v. Robert Welch, Inc., 418 U.S. 323, 351-352 (1974). Several Massachusetts cases have in fact more specifically held that union officials or those running for union office are public figures within the meaning of Gertz. See Materia v. Huff, 394 Mass. 328, 331 (1985); Lyons v. New Mass Media, Inc., 390 Mass. 51, 55-56 (1983). It therefore seems that Bowman became a public

figure with respect to the Union election by virtue of her candidacy.

Despite Bowman's status as a public figure, Hustler Magazine is distinguishable from the present case in two important aspects. First, the ad parody at issue in Hustler Magazine contained an articulable statement and criticism about the kind of public figure Falwell was. By depicting Falwell as having engaged in a drunken, incestuous rendezvous with his mother, the magazine was implying sexual and moral hypocrisy on the part of Falwell, the nationally known leader of the Moral Majority. By contrast, there is no articulable political statement which can be gleaned from the photocopies of Bowman. Although Heller stated that he intended to make Bowman look as ridiculous as he felt her ideas were during the Union campaign, he was unable during the trial

to articulate exactly how the pornographic images of Bowman conveyed such an opinion. See, e.g., Trial Transcript, Vol. 7 at 39. It appears that Heller could not so state because the photocopies were nothing more than a reduction of Bowman to a sexual object and an attack on her as a woman, rather than as a political candidate.

The United States Supreme Court has long recognized that not all speech is of equal First Amendment importance. In FCC v. Pacifica Foundation, 438 U.S. 726 (1978), the Court stated that speech that is " 'vulgar, 'offensive,' and 'shocking' " is "not entitled to absolute constitutional protection under all circumstances." Id. at 747. See also, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (State can lawfully punish speech that by its very nature inflicts injury or incites to

immediate violence). Thus a second and perhaps more crucial point of departure between Hustler Magazine and the instant case is that while the Falwell ad parody was published inside the front cover of a national magazine, Heller "published" his photocopies of Bowman at their mutual place of employment. Heller's attempt to characterize the photocopies as constitutionally valid political speech must therefore be additionally scrutinized in light of the employment context which frames the entire incident.

First Amendment concerns are subject to various restrictions in the workplace where employees may be a captive audience or countervailing employer interests may take precedence. See Lewis v. Director of the Division of Employment Security, 379 Mass. 918 (1980) (denial of unemployment benefits affirmed where General Dynamics employee wore

"Strike--G.D." jacket to work); Bryson v. City of Waycross, 888 F.2d 1562 (11th Cir.1989) (police captain's statements so disruptive to police department that city's interest in assuring efficient police protection outweighed captain's free speech interest). See also, McMullen v. Carson, 568 F.Supp. 937 (M.D.Fla.1983). One permissible workplace restriction on First Amendment freedoms is the prohibition against speech, expression, and/or conduct which constitutes sexual harassment. As one United States District Court recently stated:

> "[Pornographic] pictures and verbal harassment are not protected speech because they act as discriminatory conduct in the form of a hostile work environment." See Roberts v. United States Jaycees, 468 U.S. 609, 628, 104 S.Ct. 3244, 3255, 82 L.Ed.2d 462 (1984). ("[P]otentially expressive activities that produce special harms distinct from their communicative impact ... are entitled to no constitutional protection."); Hishon v. King & Spalding, 467 U.S. 69, 78, 104

> S.Ct. 2229, 2235, 81 L.Ed.2d 59 (1984); Strauss, Sexist Speech in the Workplace, 25 Harv.C.R.-C.L.L.Rev. 1, 38-41 (1990). In this respect, the speech at issue is indistinguishable from speech that comprises a crime, such as threats of violence or blackmail, of which there can be no doubt of the authority of the state to punish. (citations omitted)

Robinson v. Jacksonville Shipyards, Inc., 760 F.Supp. 1486, 1535 (M.D.Fla.1991). Thus in the employment context, when "expression" becomes nothing more than prohibited sexual harassment, a perpetrator cannot shield himself from tort or other civil liability by claiming First Amendment privilege. Had Heller distributed the Bowman photocopies elsewhere the analysis might be different; however, Heller chose to pass the photocopies out at work to his and Bowman's co-employees. In so doing, he crossed the line from any semblance of free expression into unlawful conduct specifically prohibited by several Massachusetts statutes.

In Count XIII of her Complaint, Bowman alleges that Heller violated her civil right to be free from sexual harassment pursuant to the Massachusetts Civil Rights Act ("MCRA"). Section 11H of M.G.L. c. 12 provides a state remedy for interference or attempts to interfere with the exercise or enjoyment of rights secured by the Constitution or laws of the United States or rights secured by the Constitution or laws of the Commonwealth by threats, intimidation, or coercion. The private counterpart to section 11H is section 11I, which authorizes a private cause of action for similar interference with secured rights.

Bowman's statutory right to be free from sexual harassment specifically arises from M.G.L. c. 214 § 1C which provides in relevant part:

> A person shall have the right to be free from sexual harassment, as defined in

> chapter one hundred and fifty-one B and fifty-one C.

Sexual harassment is defined in turn by M.G.L. c. 151B § 1(18) as:

> Sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (a) submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of employment or as a basis for employment decisions; (b) such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, humiliating or sexually offensive work environment.

Putting the above statutes together, Bowman must show by a preponderance of the evidence that (1) Heller's conduct was of a sexual nature; (2) it unreasonably interfered with her work performance; (3) by creating a hostile, intimidating, humiliating, or sexually offensive work environment; and (4) such interference was accomplished by threats, intimidation, or coercion within the of M.G.L. c. 12 §§ 11H and

11I.

With respect to the first element, it is beyond doubt that the photocopies created and distributed by Heller constitute verbal conduct of a sexual nature. Clearly, images of a woman masturbating or exposing her genitals are explicitly sexual images. With respect to the second and third elements, whether or not Heller's conduct unreasonably interfered with Bowman's work performance is measured in part by the degree to which the conduct created a hostile work environment. In Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), the Supreme Court stated that for sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. The Supreme Judicial Court essentially relied on the same analysis in

College-Town, Division of Interco, Inc. v. Massachusetts Commission Against Discrimination, 400 Mass. 156 (1987), when it held that the behavior of Chester Broad, College- Town's supervisory employee, was "sufficiently pervasive to alter the conditions of [Loretta] Rizzi's employment, and thus created a sexually harassing working environment." Id. at 162.

Traditionally, the severity or pervasiveness of the harassing conduct was to be measured from the standpoint of a reasonable person in the plaintiff's position. See Gnerre v. Massachusetts Commission Against Discrimination, 402 Mass. 502, 507 (1988). The growing trend nationally, however, seems to be one of adopting a reasonable woman standard for sexual harassment cases. As the Eight Circuit Court of Appeals very recently stated in Burns v. McGregor Electronic Industries, Inc., for

example, "We must view the harassment from the victim's perspective, and in this case the victim is a woman." 989 F.2d 959, 965 (8th Cir.1993).. The Court then went on to cite the Court of Appeals for the Third Circuit in Andrews v. City of Philadelphia, 895 F.2d 1469, 1485-86 (3d Cir.1989):

> Obscene language and pornography quite possibly could be regarded as highly offensive to a woman who seeks to deal with her fellow employees and clients with professional dignity and without the barrier of sexual differentiation and abuse. Although men may find these actions harmless and innocent, it is highly possible that women may feel otherwise.

Id. See also, Robinson v. Jacksonville Shipyards, Inc., 760 F.Supp. 1486, 1526 (M.D.Fla.1991) (to implement fully the promise of Title VII, "the standards for assessing women's psychological harm due to harassment must begin to reflect women's sensitivity to behavior once condoned as acceptable."); Ellison

v. Brady, 924 F.2d 872, 879 (9th Cir.1991) ("We ... prefer to analyze harassment from the victim's perspective. A complete understanding of the victim's view requires, among other things, an analysis of the different perspectives of men and women."); Yates v. Avco Corp., 819 F.2d 630, 637 & n. 2 (6th Cir.1987) (stating that "men and women are vulnerable in different ways and offended by different behavior").

In adopting a reasonable woman standard by which to gage the severity or pervasiveness of sexually harassing conduct, courts seem to be recognizing that the reasonable person standard often allows a male bias to creep in, thereby perpetuating the status quo. If the purpose of laws providing remedies for sexual harassment at work is to break down barriers to the full participation of women in the workplace,

College-Town, Division of Interco, Inc. v. Massachusetts Commission Against Discrimination, 400 Mass. 156, 162 (1987), then the conduct must indeed be analyzed from a woman's perspective. Heller argues, however, that when analyzed from either the perspective of a reasonable woman or reasonable person, his conduct was not sufficiently severe or pervasive to alter the conditions of Bowman's employment.

Heller relies in part on the theory that one incident of sexually offensive conduct does not a hostile environment make. He claims, rather, that Bowman must show a pattern of offensive conduct. Heller thus seems to be urging the court to apply a numerosity requirement without regard to the fact that even one incident, if severe enough, could quite possibly alter the conditions of employment for the victim. The landlord perpetrator in Gnerre

v. Massachusetts Commission Against Discrimination, 402 Mass. 502, 507 (1988), made a similar argument in the discriminatory housing context, to which the Supreme Judicial Court replied:

> [W]e specifically reject Gnerre's suggestion that we impose, as a matter of law, a quantitative requirement on the incidents of harassment that will constitute actionable sex discrimination. In College-Town, this court did not impose such a requirement in the context of sexual harassment in the workplace.

This court similarly rejects the argument that Bowman must meet some sort of numerosity requirement by showing a pattern of offensive behavior on Heller's part.

Despite Heller's attempt to characterize his conduct as merely one isolated incident, the way in which he prepared and distributed the Bowman photocopies renders his conduct not only severe, but pervasive as well. The photocopies

at issue in this case unambiguously targeted Bowman. By taking both her name and her face from one photograph and superimposing them onto other photographs of nude and partially nude female bodies, Heller specifically made Bowman the subject of the pornographic images. It was a most unwelcome appropriation of her person, and specifically her sexuality, for his hostile purposes. Heller did not then merely place the photocopies on Bowman's desk or show them only to her, he distributed them at work where they soon proliferated throughout the office. The pornographic photocopies of Bowman thus infested Bowman's workplace. They made her feel "fearful," "vulnerable," and "degraded." Knowing so many of her co-workers had seen them and laughed at them made Bowman reluctant to go to work. The entire episode altered the conditions of employment for Bowman, as it would have for

the reasonable woman and indeed for the reasonable person. Heller's creation and distribution of the photocopies clearly created an "intimidating, hostile, humiliating or sexually offensive work environment." M.G.L. c. 151B § 1(18). Heller's conduct thus violated Bowman's right to be free from sexual harassment.[4] M.G.L. c. 214 § 1C.

Because Bowman invokes M.G.L. c. 12 §§ 11H and 11I to challenge Heller's interference with her civil rights, she must show that the interference was accomplished by threats, intimidation, or coercion. Heller vigorously argues that in order for his conduct to be deemed threatening, intimidating, or coercive within the meaning of the MCRA, it must have

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[4]I have applied the reasonable woman standard here because, for the reasons stated, it is the correct one. I also find, however, that Heller's conduct was impermissible sexual harassment by the standard of the reasonable person.

involved actual or potential physical confrontation accompanied by a threat of harm. Heller relies for this proposition on Bally v. Northeastern University, 403 Mass 713 (1989) and its progeny.[5] In Bally, the plaintiff, a student athlete, claimed that the university violated his civil rights by requiring drug testing as a condition of participation in intercollegiate sports. The court differentiated Bally's claim from others for which it had previously granted relief under the MCRA on two grounds. First, the previous cases all involved measures directed toward a particular individual or class of persons, whereas Northeastern's drug policy involved

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[5]See e.g. Longval v. Commissioner of Correction, 404 Mass. 325, 333 (1989); Layne v. Superintendent, Massachusetts Correctional Institution, Cedar Junction, 406 Mass. 156, 158 (1989); Biggins v. Hazen Paper Co., 953 F.2d 1405, 1425 (1st Cir.1992).

"indiscriminate, impartially administered testing." Id. at 719. Second, cases such as Batchelder v. Allied Stores Corp., 400 Mass. 686 (1985), Bell v. Mazza, 394 Mass. 176 (1985), and O'Connell v. Chasdi, 400 Mass. 686 (1987), "each involved physical confrontation accompanied by a threat of harm." Id.

Yet Bally itself expressly recognized that "threats, intimidation, and coercion" could involve other than physical confrontation, by stating, "Although Redgrave did not involve physical confrontation, the Boston Symphony Orchestra's action involved the loss of a contract right." Bally at 720. The claim in Redgrave v. Boston Symphony Orchestra, Inc., 399 Mass. 93 (1987), had concerned the coercive effect of economic sanctions on the plaintiff's right to engage in unrelated political speech. In other words, the Boston Symphony Orchestra's

cancellation of its contract with Redgrave was a "measure directed toward a particular individual." Bally at 718. Furthermore, in analyzing an MCRA claim, the Court in Deas v. Dempsy, 403 Mass. 468, 471 (1988), defined coercion as "the application to another of such force, either physical or moral, as to constrain him to do against his will something he would not otherwise have done." (emphasis added).

The overly narrow reading of "threats, intimidation, and coercion" articulated in subsequent cases, citing Bally as authority, is also inconsistent with the interpretation of similar terms in other statutes. See e.g., Smith v. Stechel, 510 F.2d 1162, 1164 (9th Cir.1975) (firing employees who aided others in exercising their rights by renting apartments to members of minority groups would constitute threat, intimidation, coercion, or interference

under Fair Housing Act, 42 U.S.C. § 3617); United States v. Bruce, 353 F.2d 474, 476-79 (5th Cir.1965) (economic sanctions by landlord, interfering with right to vote, constituted coercion); United States v. Beaty, 288 F.2d 653, 656 (6th Cir.1961) (threats of eviction if tenants exercised their right to vote constituted coercion).

Sexual harassment, by its very nature, is threatening, intimidating, and coercive. It is a crude way of telling women that they are neither wanted nor valued in the workplace. As the Supreme Judicial Court stated in College-Town, Division of Interco., Inc. v. Massachusetts Commission Against Discrimination, 400 Mass. 156, 162 (1987), "A work environment pervaded by harassment or abuse, with the resulting intimidation, humiliation, and stigmatization, poses a formidable barrier to

full participation of an individual in the workplace." Sexual harassment thus creates a barrier, based solely on gender, to a woman's full and untrammelled participation in the workplace.

Heller's photocopies of Bowman explicitly attacked her as a woman. They were intimidating because they communicated to her that despite her long commitment to both her work and union activity, she could quite easiiy be reduced to nothing more than a naked woman, spread-eagled and exposed. Such a message can be extremely threatening to a woman.

> [B]ecause women are disproportionately the victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. Women who are the victims of [even] mild forms of sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault.

Ellison v. Brady, 924 F.2d 872, 879 (9th

Cir.1991). In this way, sexual harassment may ultimately carry with it an inherent threat of physical confrontation. Bowman testified that Heller's pornographic photocopies did indeed make her feel vulnerable and afraid. They represented a violation of both her personal and bodily integrity by associating both her name and her face with sexually explicit images. By creating and distributing the photocopies of Bowman, Heller violated Bowman's right to be free from sexual harassment. Furthermore, such creation and distribution of the photocopies was threatening and intimidating within the meaning of M.G.L. c. 12 §§ 11H and 11I.[6]

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[6]It is no defense to Bowman's claim under the MCRA that Heller did not intend to interfere with her civil rights or did not realize that his conduct would be viewed as sexual harassment. The Supreme Judicial Court has interpreted the MCRA as imposing "no express or implied requirement that an actor specifically intended to deprive a person of a secured right in order to be liable under the statute." Redgrave v. Boston Symphony Orchestra, Inc., 399 Mass. 93, 99 (1987). See also, O'Connell

In addition to interfering with her right to be free from sexual harassment, Bowman alleges that Heller attempted to interfere with her right to run for union office by the same conduct, also in violation of the MCRA. Bowman's right to run for union office is secured by the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 481(e), Article I, Parts 1 and 9 of the Massachusetts Constitution, and M.G.L. c. 150E. Because the MCRA imposes liability for attempts as well as for actual interference, there need not be a finding that the distribution of the photocopies did in fact interfere with Bowman's campaign. Thus the fact that Bowman was able to continue with the campaign until the end does not bar her second MCRA claim.

Heller's conduct regarding the photocopies

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v. Chasdi, 400 Mass. 686, 694 (1987).

amounted to an attempt to interfere with Bowman's right to run for union office. Heller specifically took Bowman's head and name from her campaign post card in order to create the pornographic photocopies of her. He distributed the photocopies at work to various co-employees, including Bowman's own campaign treasurer, while active campaigning for the Union presidency was still on-going. As previously established, Heller knew or should have known that given the inflammatory nature of the photocopies and the office practice of circulating various "satirical" materials, Bowman was not only substantially certain to see them, but would be greatly upset by them. Although Bowman chose for strategic reasons not to view the photocopies until active campaigning was over, had she seen them sooner, her reaction to them might very well have interfered with her

campaign.

That Heller utilized pornographic images of Bowman in his attempt to interfere with her political rights was inherently intimidating. It is beyond doubt that a reasonable woman (or in the alternative a reasonable person) contemplating a candidacy such as Bowman's would, at the very least, hesitate to undertake it or to continue if the price exacted is gender-based humiliation in the workplace to the degree which Bowman ultimately experienced.

I turn now to Heller's counterclaims against Bowman for defamation. Count I involves the "Charges Against David Heller" (the "Charges") which Arthur Casey filed with the Union Trial Board on Bowman's behalf. Heller claims that by photocopying the Charges onto Union stationery and then posting them in the Worcester Welfare Office, Bowman "published"

statements which were false or from which false and harmful inferences could be drawn. Specifically, Heller argues that the Charges on Union stationary implied that the Union as a body was taking action against him, rather than a fellow Union member. With respect to Count II, Heller claims that Bowman's reference to the photocopies incident as a "sexual assault" in a memorandum ("Sicktime Memo") to her supervisor and various other Office and Union personnel falsely accused him of criminal behavior.

In order to prevail on his counterclaims, Heller must prove by a preponderance of the evidence that (1) the statements of and concerning him were defamatory in character; (2) they were false; (3) they were published by Bowman; and (4) he suffered direct and proximate damages as a result. New England Tractor Trailer Training of Connecticut, Inc. v.

Globe Newspaper Co., 395 Mass. 471 (1985). The law in Massachusetts is that a publication is defamatory if it holds the plaintiff up to contempt, hatred, scorn, or ridicule or tends to impair his standing in the minds of a considerable and respectable class of the community. Brauer v. Globe Newspaper Co., 351 Mass. 53 (1966); Grande & Son, Inc. v. Chace, 333 Mass. 166 (1955); Tartaglia v. Townsend, 19 Mass.App.Ct. 693 (1985). With respect to statements of opinion,

> [a] defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis of the opinion.

Lyons v. Globe Newspaper Co., 415 Mass. 258, 258 (1993), citing National Ass'n of Gov't Employees, Inc. v. Central Broadcasting Corp., 379 Mass. 220, 227 (1979).

Bowman first argues that her statements regarding Heller are not actionable because she had a conditional privilege to publish them. As a Union officer, Bowman claims she had a right to post complying materials pertaining to Union affairs on the Union bulletin board. With regard to the Sicktime Memo, Bowman states she had a legitimate interest in notifying her supervisor and various management or recordkeeping personnel of time she needed off for therapy as a result of the photocopies incident. Bowman defends copies of the Memo which she gave to the Union stewards in her office as a necessary precaution in the event one of them had to represent her in any dispute with management regarding her time off. Bowman cites as authority Humphrey v. National Semiconductor Corp., 18 Mass.App.Ct. 132, 133-134 (1984), which states that a defamatory

statement is conditionally privileged if it is published to those with whom the defendant had a legitimate reason for sharing it.

Bowman's second line of defense is that her statements regarding Heller were merely statements of opinion. Aside from identifying Heller as the perpetrator of the photocopies (admitted as true by Heller), Bowman argues that the other statements contained in the Charges only express an opinion about the nature of Heller's conduct. Bowman additionally argues that her characterization of the photocopies incident as a "sexual assault" was clearly an expression of opinion if taken in context with the rest of the Sicktime Memo. The second half of the Memo referred specifically to the Department's sexual harassment policy, for example.

Whether or not Bowman had a conditional

privilege to publish the documents in question and whether or not Bowman's statements constituted non-actionable expressions of opinion, Heller's counterclaims ultimately fail because he has not proved Bowman's statements actually defamed him. Heller was unable to present more than his own speculation as to how the statements contained in the Charges and the Sicktime memo damaged his reputation or held him up to ridicule and contempt. On the contrary, Heller acknowledged during cross-examination that the reason some of his co-workers, two individuals in particular, stopped talking to him for a period of time may have been because he had created and distributed the obscene photocopies in the first place. See Trial Transcript, Vol. 7 at 17. Furthermore, even if actionable, Heller's counterclaims are not compensable because he has presented

insufficient evidence on the issue of damages. He did not offer any corroborating testimony or produce any evidence causally linking his injuries to the posting of the Charges and/or the circulation of the Sicktime Memo, as opposed to, for example, the Department's investigation of his misconduct. Heller's own vague testimony about his injuries, including emotional distress, merely revealed that he did not seek any type of therapy or medical treatment for his symptoms. For the foregoing reasons, I find against the defendant on his counterclaims and they will be dismissed.

Lastly, the plaintiff urges that I award damages to her in a total amount of one hundred sixty thousand dollars ($160,000.00), fifty thousand dollars ($50,000.00) for intentional infliction of emotional distress, fifty thousand dollars ($50,000.00) for reckless infliction,

fifty thousand dollars ($50,000.00) for sexual harassment, and ten thousand dollars ($10,000.00) for violating her right to seek Union office.

The plaintiff's approach to the issue of damages is fragmented or duplicative; and I disagree with it. To be sure, the defendant's vile deed violated several rights of the plaintiff. But the misconduct itself was a discrete event, although the defendant certainly compounded it by his subsequent negative stance. And although the plaintiff was injured in more ways than one, i.e., attempted interference with her campaign as well as emotional distress, the several adverse effects resulted from the defendant's one outrageous attack. Therefore, while the plaintiff is entitled to be fairly compensated for the pain and suffering inflicted by the defendant, Haddad v. Gonzalez, 410 Mass.

855, 870-871 (1991), and for the reasonable cost of her therapeutic expenses resulting from his attack,[7] subdividing her losses and correlating them with her claims for relief is uncalled for.

I conclude that a total damages award of thirty-five thousand dollars ($35,000.00) will fairly and adequately compensate the plaintiff for her injuries. In keeping with my view of the unitary nature of the harm inflicted here, I also rule that any one of the plaintiff's claims (c. 12, § 11I, c. 214, § 1C, and intentional infliction of emotional distress) is a sufficient basis for the foregoing award.

The plaintiff also seeks costs and reasonable attorneys' fees, and she is entitled to them. M.G.L. c. 12, § 11I. The plaintiff may file an appropriate motion, with supporting

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[7]The plaintiff makes no claim for reduced earning capacity.

materials, on or before July 30, 1993, and the defendant may file responsively on or before August 20, 1993. Either party may request a hearing on the motion.

So Ordered.

ADDENDUM[1]

What Hillary Problem?, Spy Magazine, Feb. 1993 . . . . . Ad.2

The Bodies Politic (flags as figleaves), Playgirl, Apr. 1994 . . . . . Ad.3

The Bodies Politic (flags lowered), Playgirl, Apr. 1994 . . . . . Ad.4

And in this Corner ... It's Tonya?, Boston Herald, Mar. 15, 1994 . . . . . Ad.5

Was JFK a Drag Queen?, Spy Magazine, Mar. 1993 . . . . . Ad.6

Winston Churchill in Pantyhose?, Playgirl, Apr. 1994 . . . . . Ad.7

Whoops! Dey it is!!, Slick Times, Winter 1994 . . . . . Ad.8

Asshole of the Month (Alan M. Dershowitz), Hustler Magazine, Feb. 1992 . . . . . Ad.9

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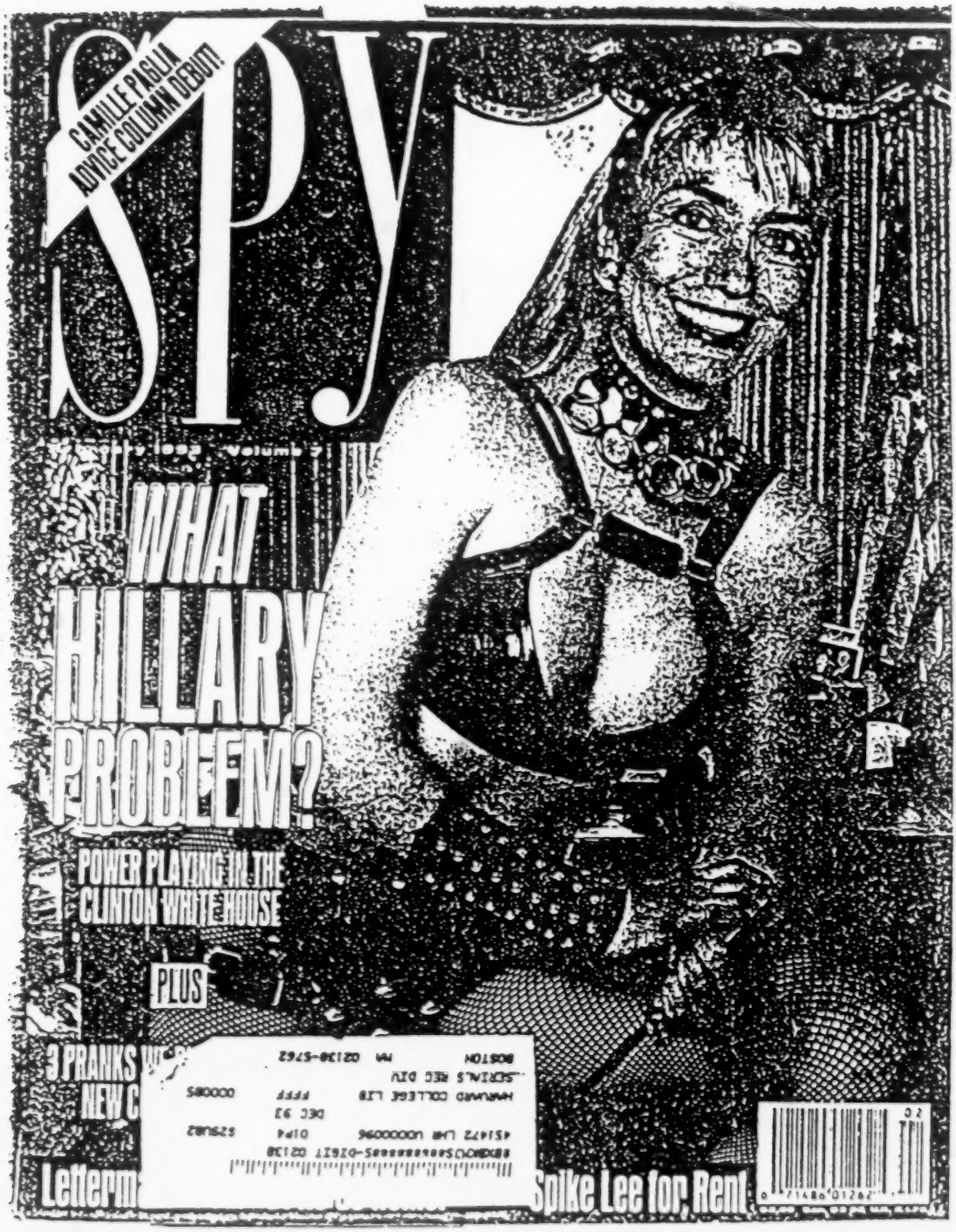
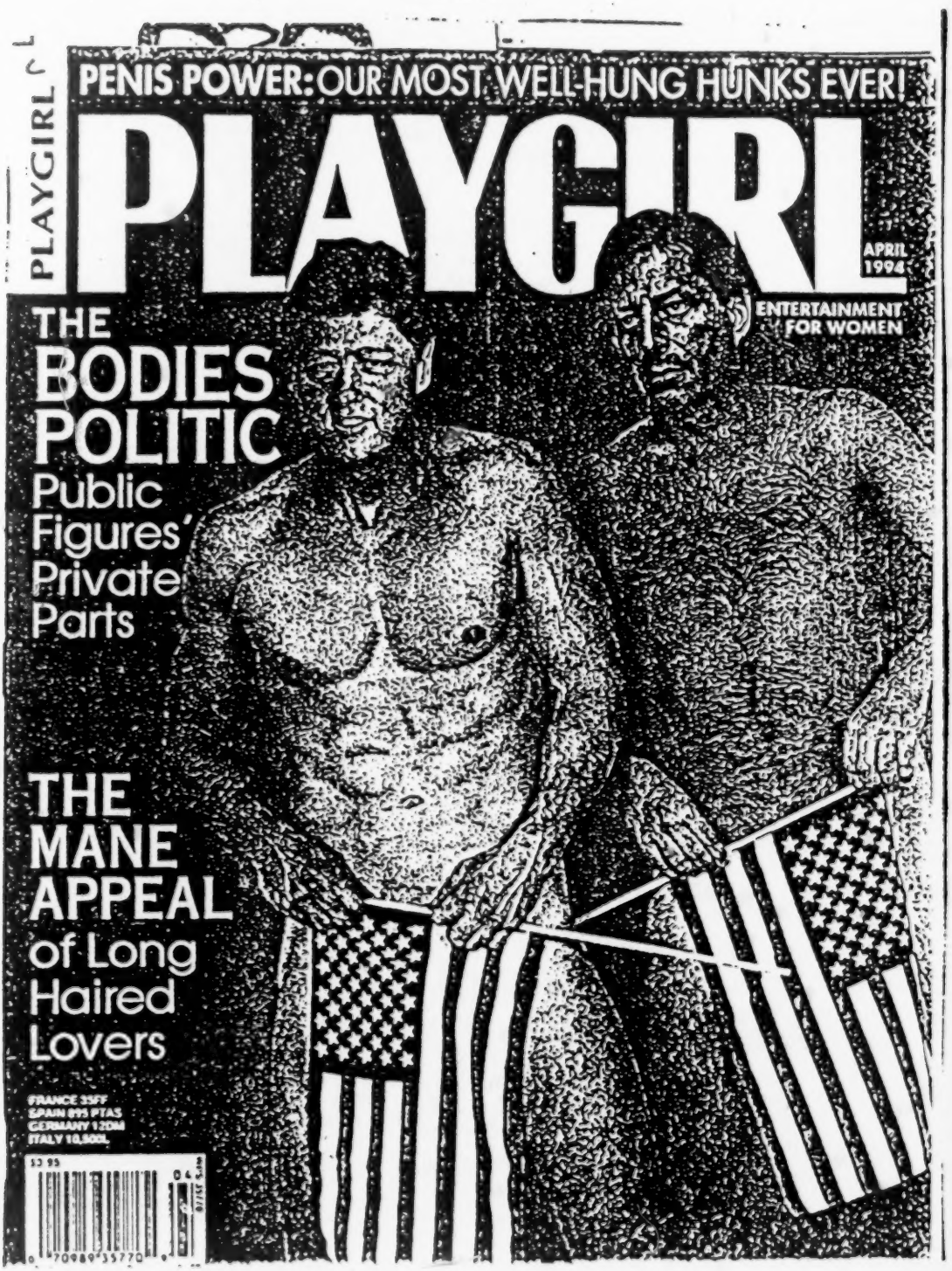
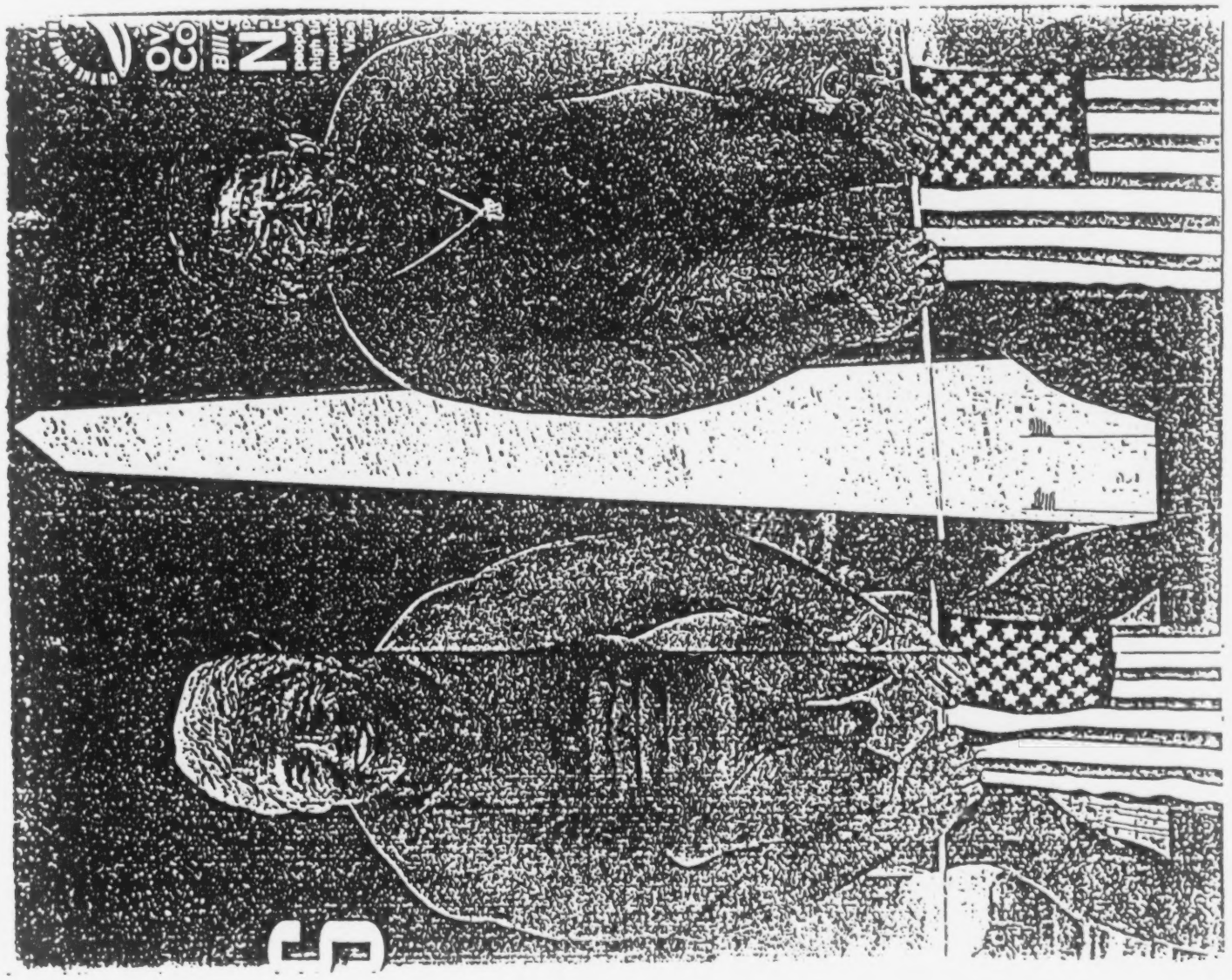
[1]This Addendum represents a selection of some of the photocollages from magazines currently in circulation which were attached as an Addendum to the petitioner's brief before the Massachusetts Supreme Judicial Court.


SPY
CAMILLE PAGLIA ADVICE COLUMN DEBUT!
WHAT HILLARY PROBLEM?
POWER PLAYING IN THE CLINTON WHITE HOUSE
PLUS
3 PRANKS
NEW C
Letterm
Spike Lee for Rent


PLAYGIRL
PENIS POWER: OUR MOST WELL-HUNG HUNKS EVER!
PLAYGIRL
APRIL 1994
ENTERTAINMENT FOR WOMEN
THE BODIES POLITIC
Public Figures' Private Parts
THE MANE APPEAL
of Long Haired Lovers
FRANCE 35FF
SPAIN 895 PTAS
GERMANY 12DM
ITALY 10,500L
$3.95



Ad.4

And in this corner . . .

It's Tonya?

TOKYO — It might not have the prestige of an office from Disney or Revlon. But one Japanese businessman says Tonya Harding has just the image he's looking for.

Tonya was made to be a pro wrestler. Take it Mitsunaga, chairman of the hugely popular sport's All Japan Women's Professional Wrestling Association, said yesterday. "She's about as tough as they come, and she'll last a lot longer in our sport than she will in figure skating."

Mitsunaga says he's willing to pay Harding $3 million to get into the ring. "If that's what Disney's paying Nancy Kerrigan, that's what we'll pay Tonya," even if I have to go into debt to do it," he said.

A representative of the wrestling association has been sent to Oregon to make Harding an offer. Mitsunaga said he hopes to meet Harding while she is in Japan for the World Figure Skating Championships, which begin next Tokyo next week.

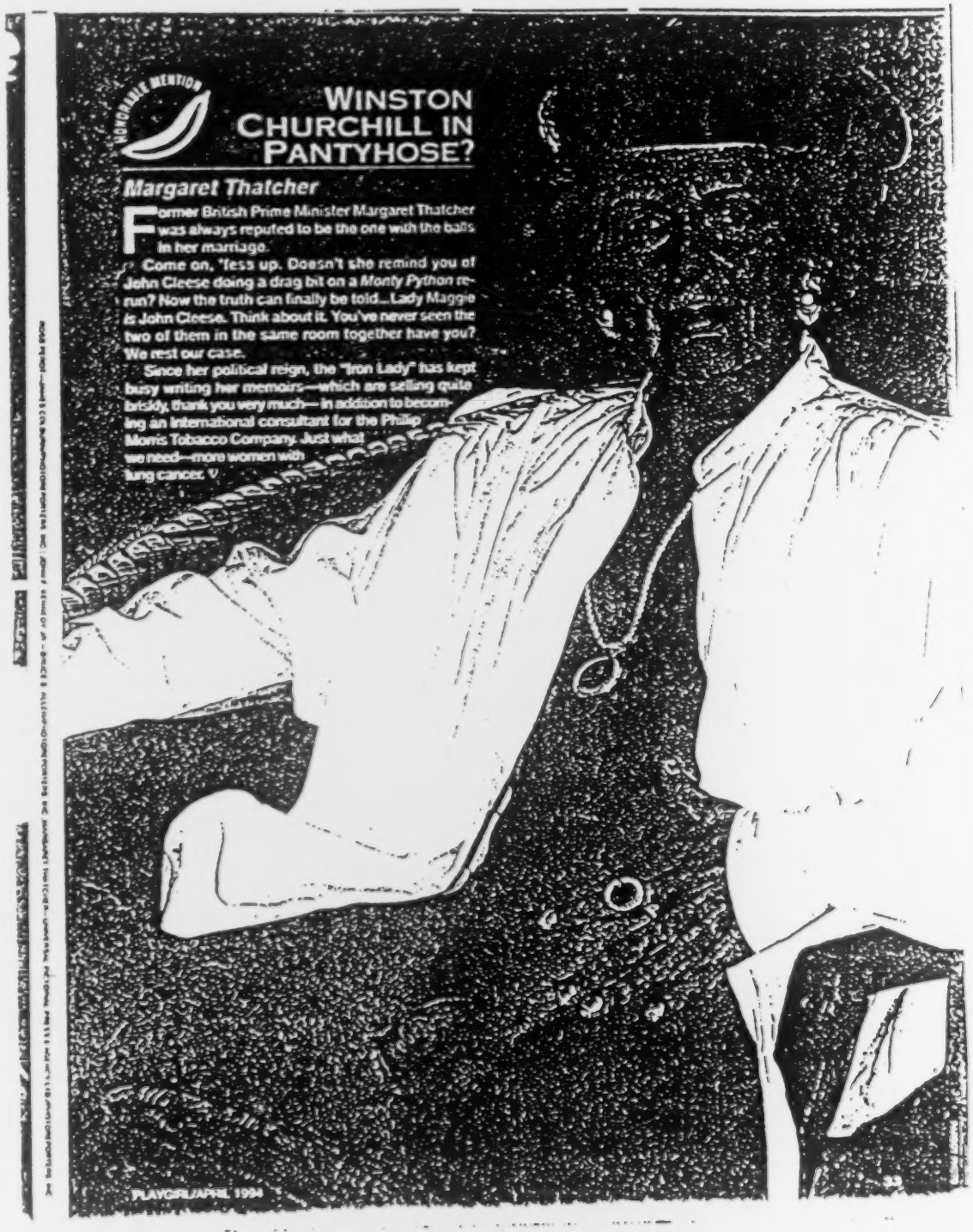
WRESTLEMANIA: Tonya Harding accepts the $2 million offer to wrestle [illegible] at the Silver Dome [illegible] response from London was [illegible] "all is over," Hume said.

[illegible] the European parliament.

Ad.5

SPY
THE MANIAC BEHIND THE WOMAN BEHIND MURPHY BROWN
March
HOLLYWOOD EXPOSED!
161 POWER BROKERS—
SPECIAL FOLDOUT SPY GUIDE
40 STARS' INSANE SALARIES!
CELIA BRADY IN ASPEN!
WAS JFK A DRAG QUEEN?
The U.S. Navy's Dirty Little Secrets
eazles! New Congressman?

Ad.6


HONORABLE MENTION
WINSTON CHURCHILL IN PANTYHOSE?
Margaret Thatcher
Former British Prime Minister Margaret Thatcher was always reputed to be the one with the balls in her marriage.
Come on, 'fess up. Doesn't she remind you of John Cleese doing a drag bit on a Monty Python re-run? Now the truth can finally be told...Lady Maggie is John Cleese. Think about it. You've never seen the two of them in the same room together have you? We rest our case.
Since her political reign, the "Iron Lady" has kept busy writing her memoirs—which are selling quite briskly, thank you very much—in addition to becoming an international consultant for the Philip Morris Tobacco Company. Just what we need—more women with lung cancer.
PLAYGIRL/APRIL 1994

Ad.7

Ad.8

BITS and PIECES

ASSHOLE OF THE MONTH

ALAN M. DERSHOWITZ

He can paint flapjack on his sphincters and whistle "Hava Nagila" through his rectum, but an Asshole is still an Asshole. Alan M. Dershowitz, headline-chasing Harvard Law professor and HUSTLER's Asshole of the Month for February 1992, is a shit ring in lifesaver's disguise.

"I believe in free speech for everybody without exception," orates Dershowitz. At his $400-an-hour fees, free speech is not cheap. The Yale Law School alumnus smugly accepts being labeled "the lawyer of last resort," boasting that he will often "hear from people who have nowhere else to turn."

Yet Dersh, who pulls down $100,000-plus yearly from Harvard, also hears from people who have ywhere else to turn. Rich-guy .der suspect Claus von Bulow, tax-cheating hotel mogul Leona Helmsley, swindling evangelist Jim Bakker, junk-bond felon Michael Milken—all have bought assistance from Dershowitz.

Dershowitz says he chooses only those clients who offer him the chance to right a grievous wrong or uphold a hallowed principle of democracy. His docket of democracy-saving defenses includes such wrongs-to-be-righted as money laundering and cocaine distribution, conspiracy to smuggle 18 tons of hashish, a scheme by a personal-injury lawyer to submit fraudulent medical bills to insurance companies, a conspiracy by organized-crime figures to extort money from vending-machine companies, a racketeering conspiracy involving loan sharking, conspiracy to murder a government witness, and an organized-crime effort to infiltrate the New York waterfront.

Dershowitz would have the world believe that he is idealistically superior to the slick-tongued dope lawyers and Mob mouthpieces who ensure that crime for profit remains an American blight. Turn on *Donahue, Geraldo, Merv Griffin, David Letterman, Morton Downey Jr.*—there's Prof. Dersh hawking his brilliant ass in the seamy spotlight, posing as a higher moral authority.

The myth of Dershowitz as liberal superhero is furthered in *Reversal of Fortune*, a 1990 movie made from a book written by Dershowitz. A subplot of the film depicts the lawyer's rabid concern for the fictional "Johnson brothers," two young blacks on Alabama's Death Row who helped their dad escape from prison and are unjustly being punished for a murder the father later committed.

In real life, minus factual manipulation, Dershowitz represented the Tison brothers. Subsequently locked up in Arizona, the Tisons busted out their killer pop and a murderer buddy, armed both with guns and stood by as the cons wasted a family of four while procuring a getaway car. One more discrepancy: The Tisons are white; a less-than-ideal hue to a moral crusader.

"The major criterion for me taking a case," crows the defender, "is, 'Have I gotten pissed off at something or somebody?' " The plight of rich people in trouble seems to truly anger Dershowitz. Enlisted to assist in reducing Wall Street mega-cheat Michael Milken's ten-year sentence, Dershowitz's most voluble argument so far is that Milken is the victim of an anti-Semitic smear campaign.

But then Dershowitz, who portrays himself as a member of an oppressed minority, sees anti-Semitism everywhere, asserting that American Jews are treated as second-class citizens in a country where they enjoy wealth and political influence out of proportion to their share of the population. "Every time I attend a gathering of Jewish children," writes Dersh in his chauvinistic screed *Chutzpah*, "I imagine SS guards lining up these children for the gas chambers." Which is one more thing the little lawyer has in common with Adolf Hitler. Like Der Fuehrer, Dersh is driven by ethnic zealotry, bristles under criticism and puts forth the notion of a special, privileged race.

On most days, Dershowitz is slightly more popular with American Jews than is Adolf. Henry Siegman, executive director of the American Jewish Congress, characterizes the prof as an "unscrupulous and self-serving" liar.

Last year Dershowitz insisted that admitted felon Milken must serve real jail time. Now that he's on the junk-bond gravy train, Dersh maintains the czar should be freed. He's changed the tune he whistles, but the Asshole still stinks.

FARTS IN THE WIND

Ad.9

NOV 13 1995

(2)

No. 95-393

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DAVID HELLER,

Petitioner,

v.

SYLVIA SMITH BOWMAN,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Judicial Court
of the Commonwealth of Massachusetts

MOTION OF THE ASSOCIATION FOR UNION DEMOCRACY FOR LEAVE TO FILE A BRIEF AND BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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Attorneys for the Association
for Union Democracy as *Amicus Curiae*

November 13, 1995

BEST AVAILABLE COPY

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MOTION OF THE ASSOCIATION FOR UNION DEMOCRACY FOR LEAVE TO FILE A BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Association for Union Democracy ("Association"), moves the Court to grant it leave to file the attached brief in support of the petition for a writ of certiorari, with petitioner's consent but without respondent's consent, for the following reasons:

1. Petitioner, a union member, asks the Court to grant certiorari to review a judgment upholding his liability for tortiously inflicting emotional distress on a fellow union member by publishing two pornographic photo collages during the time that she was running for president of their union. The petition asks the Court to consider whether the First Amendment requires the courts below to accord

petitioner greater protection of his right to criticize a candidate than they gave him.

2. The Association is a non-profit corporation, founded in 1969 and based in Brooklyn, New York, that seeks to further democratic principles and practices in labor organizations, both by encouraging members to participate actively in the internal life of their unions, and by protecting the exercise of their democratic rights within unions. No other organization devotes itself primarily to this objective.

3. In order to accomplish this objective, the Association publishes books, manuals and a newsletter; holds conferences attended by workers, lawyers and scholars; gives advice to members experiencing union democracy problems about how to organize within their unions to achieve more accountability and to eliminate corruption; and refers members whose union democracy problems may require litigation to lawyers who may be able to represent them. In addition, the Association has participated as *amicus curiae* in numerous cases in this Court. *E.g.*, *Wooddell v. IBEW Local 71*, 502 U.S. 93 (1991); *Breininger v. Sheet Metal Workers Local 6*, 493 U.S. 67 (1989); *Sheet Metal Workers v. Lynn*, 488 U.S. 347 (1989); *Finnegan v. Leu*, 456 U.S. 431 (1982).

4. In the past, the Association has provided legal and other support to numerous workers who have been threatened with retaliation for their exercise of their free speech right to criticize the leaders of their unions. The Association has watched with concern as a rising tide of libel suits threatens to suppress the sort of intra-union free speech that Congress sought to protect by passing the Landrum-Griffin Act. The

treatment of union officers, and candidates for union office, as limited public figures under the First Amendment may play an important role in permitting persons outside the union, such as general-circulation newspapers and magazines, to report on intra-union controversies. Within a union, however, it is unnecessary to rely on the First Amendment, because the principles of federal labor law provide at least as much protection to intra-union critics as the First Amendment might.

5. The Association has filed as *amicus curiae* in the past to urge the development of rules of state and federal law that would better protect union members against the crippling effect of libel litigation. *Trustees of the Southern California IBEW-NECA Trust Fund v. Jones*, 4th Civ. N. G 00 8384 (Cal. App.). Because of the Association's extensive experience with union democracy problems, it seeks leave to file the accompanying brief to explain how this case can be resolved under the principles of federal labor law, without reaching the First Amendment issues that are raised in the petition.

6. The written consent of petitioner's counsel to the filing of this brief is lodged with the Clerk. Respondent's counsel, Martha Davis, Esquire, refuses to grant consent.

CONCLUSION

The motion for leave to file a brief as *amicus curiae* in support of the petition should be granted.

Respectfully submitted,

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Attorneys for the Association
for Union Democracy as *Amicus Curiae*

November 13, 1995

QUESTION PRESENTED

If a union member publishes a written criticism of another union member who is running for union office, is a tort suit based on that writing governed by the federal labor law principles of *Linn v. Plant Guards*, 383 U.S. 53 (1966), and *Letter Carriers Local 496 v. Austin*, 418 U.S. 264 (1974), thus making it unnecessary to decide whether the First Amendment requires a finding of actual malice?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-393

DAVID HELLER,

Petitioner,

v.

SYLVIA SMITH BOWMAN,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Judicial Court
of the Commonwealth of Massachusetts

BRIEF OF THE ASSOCIATION FOR UNION DEMOCRACY IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Association for Union Democracy ("Association") urges the Court to grant certiorari because this case presents important questions of federal law regarding the extent to which candidates in union elections may shift the forum where their qualifications for office will be decided, from the members who are eligible to vote on their candidacies, to the courts. However, the Association believes that the constitutional questions presented by the petition need not be decided here, because the judgment below conflicts with the rights of union members under federal labor law to express their views about candidates for office. Moreover, longstanding precedent in this Court requires plaintiffs

by expression concerning labor disputes to meet evidentiary standards that are at least as great as, and in some respects higher than, the standards that are imposed by the First Amendment. Accordingly, the Court should grant certiorari and reverse the judgment below on statutory rather than First Amendment grounds.

INTEREST OF AMICUS CURIAE

The interest of amicus curiae is set forth in the motion for leave to file that is printed with this brief.

STATEMENT

This case involves a suit by a disappointed candidate for office, over the content of a communication by one of her fellow members during the height of her election campaign. Respondent Shirley Smith-Bowman, a supervisor in a state welfare agency, ran for president of Service Employees Local 509, a union whose jurisdiction includes the entire state of Massachusetts and which represents private sector as well as public employees. During that campaign, petitioner David Heller, a non-supervisory employee who worked in the same office as respondent, created two collages of photographs that superimposed respondent's name and face, as shown on her campaign material, on sexist photographs taken from a Penthouse-style magazine. Petitioner's stated purpose was to poke fun at respondent's campaign and reflect what he regarded as "the absurdity of some of her views and statements." The trial court found that his material "amounted to an attempt to interfere with [respondent's] right to run for union office." Pet. App. A90.

During the campaign, respondent attempted to ignore the photographs in order to avoid making an issue of them; after she lost the election, she began to suffer "Post-Traumatic Stress Disorder." Thereafter, a union officer filed intra-union charges against petitioner, on respondent's behalf, and petitioner was censured for his collages. Respondent also filed suit against petitioner Heller and others in state court, alleging a variety of state torts, including defamation and intentional infliction of emotional distress, and a state civil rights claim. The infliction of emotional distress and civil rights claims were tried to the bench, resulting in an award of damages against petitioner.

On appeal, the Supreme Judicial Court of Massachusetts found no violation of the Massachusetts Civil Rights Act, but nevertheless affirmed the judgment because it was supported by the claim of tortious infliction of emotional distress. In accord with this Court's decision in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), that a plaintiff cannot avoid meeting *New York Times* standards for a libel action simply by labeling a claim based on injurious expression as a different kind of tort, the Supreme Judicial Court turned directly to the question whether respondent was a public figure, generally or for the limited purpose of statements during her election campaign. It found that she was not, and therefore concluded that it was unnecessary to decide whether the respondent had shown actual malice on the part of petitioner. Pet. App. A12-A21. The Court also rejected petitioner's assertion that the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA") provided him with special protection against the application of state tort law. According to the Court, federal labor law preempts a state tort claim **only** when the state claim is inextricably

intertwined with consideration of the terms of a collective bargaining agreement. *Id.* A24-A25, *citing Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985).

In dissent, two Justices rejected the majority's analysis of all federal law issues. First, they concluded that a candidate for union office, like a candidate for public office or a union incumbent, is a public figure at least for the purpose of statements related to that candidacy, therefore all candidates for union office must show actual malice. Second, they stated that the actual malice standard would apply even if respondent were a private figure, because this Court's cases require use of that standard in free speech cases involving unions. In this regard, they found in the LMRDA the relevant federal law that supported the policy of free speech in union office elections.

REASONS FOR GRANTING THE WRIT

I. THE PETITION SHOULD BE GRANTED BECAUSE IT RAISES IMPORTANT QUESTIONS OF FEDERAL LAW, BUT THE JUDGMENT CAN BE VACATED WITHOUT REACHING THE CONSTITUTIONAL QUESTIONS BECAUSE THERE ARE FEDERAL STATUTES THAT ARE DIRECTLY APPLICABLE TO THIS CASE.

We fully agree with petitioner's argument that a union member should be able to express his views about a candidate in a union election, however repulsive his expression may be, free of tort liability, unless the candidate can at least establish that the member's statements were false and were made with actual malice. In particular, we agree that a candidate for union office, like a union incumbent, is

a public figure for the purpose of comments directed to his performance in office or his campaign for election. Almost every lower court to consider that question has come to the same conclusion.[1]

We do not, however, agree with petitioner that it is necessary to reach the constitutional questions that are presented in his petition in order to arrive at that result. Quite to the contrary, the courts below were presented with, and resolved, issues of federal labor law preemption that, properly decided, would have required respondent to prove actual malice and more before her suit could succeed. Moreover, the decision below conflicts with the decisions of numerous federal and state courts that have applied such a preemption analysis to cases arising out of intra-union controversies comparable to this one. Accordingly, the Association urges the Court to grant the petition for a writ of

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[1] *Miller v. Transamerican Press*, 621 F.2d 721, 724 (5th Cir. 1980) (Teamsters union officer); *Carey v. Hume*, 492 F.2d 631, 634 n.3 (D.C. Cir. 1974) (general counsel of Mine Workers); *Teachers Local 1581 v. Ysrael*, 492 F.2d 438, 439 (9th Cir. 1974) (parties agreed that union and its officers were public figures); *Henry v. Air Traffic Specialists*, 836 F. Supp. 1204, 1206 n.3 (D. Md. 1993), *aff'd mem.*, 34 F.3d 1006 (4th Cir. 1994) (head of 1700-member union); *Bussie v. Larson*, 501 F. Supp. 1107 (M.D. La. 1980) (head of Louisiana AFL-CIO); *Einhorn v. LaChance*, 823 S.W.2d 405 (Tex. App. - Houston [1st Dist.] 1992) (organizers of group of pilots); *Savitsky v. Shenandoah Valley Pub. Corp.*, 389 Pa. Super. 176, 566 A.2d 901 (1989) (member, district executive board); *Lins v. Evening News Ass'n*, 342 N.W.2d 573, 579-580 (Mich. App. 1983) (head of Teamster local); *Korbar v. Hite*, 43 Ill. App.3d 636, 357 N.E.2d 135, 139 (1976) (head of Steelworkers local credit union). *See also NAGE v. Central Broadcasting Corp.*, 379 Mass. 220, 396 N.E.2d 996, 1002 n.12 (1979) (union is limited purpose public figure).

certiorari, but to resolve the case on the basis of federal labor law and thus avoid the constitutional issues that are presented in the petition.

1. To describe intra-union political debates as consisting of "robust" speech would be an understatement. As in American elections, accusations, hyperbole, name-calling and other strong language are common. It is not uncommon for rival candidates and factions to accuse each other of selling out to the employer, of being in bed with enemies of the union, of corruption of various kinds, of having dangerous or unconventional political views, and the like. For example, in the leading case of *Salzhandler v. Caputo*, 316 F.2d 445 (2d Cir. 1963), which established the basic judicial attitude toward members' free speech rights under the LMRDA, a union officer had written a leaflet calling a fellow officer a "petty robber," and describing others as "thieves, scabs, robbers, scabby bosses, bums, pimps, f------ bums, and jailbirds." *Id.* at 447. In the 1991 Teamster election, held under government supervision pursuant to a consent decree, the incumbents depicted the insurgent candidate as a scab; the reform candidate portrayed the incumbents as pigs feasting at a trough of money, and printed a photo of the principal incumbent candidate linking arms with one man wearing a prison uniform and another wearing a suit with a black shirt and white tie, carrying a machine gun.

The speech on both sides of the election in this case was apparently not atypical. Respondent accused both petitioner, and the candidate that petitioner supported, of being "communists." Petitioner, in turn, produced disgusting attacks on respondent which, although they had nothing to do with her qualifications for office, surely had

the effect of denigrating her candidacy. As we now explain, the courts have long protected the rights of union members to engage in vituperative exchanges in the course of an election campaign.

2. When the LMRDA was passed, a number of unions had provisions in their constitutions or bylaws that barred members from speaking ill of their officers; such provisions forbade members to make "false statements," to "spread dissension," to "abuse" or "slander" officers, and the like. The LMRDA, which among other things guarantees all members the right to "express any views, arguments and opinions," section 101(a)(2), did not, by its passage alone, deter union officers from trying to discipline members for violations of provisions of this sort. But the courts of appeals (and other courts) have been unanimous, since *Salzhandler v. Caputo*, *supra*, was decided in 1963, that section 101(a)(2) of the LMRDA forbids unions and their officers from disciplining members for the violation of such provisions. *Petramale v. Laborers Local 17*, 736 F.2d 13, 17 (2d Cir. 1985); *Rollison v. Hotel Restaurant Local 879*, 677 F.2d 741, 745-746 (9th Cir. 1982); *Keeffe Bros. v. Teamsters Local 592*, 562 F.2d 298, 304 (4th Cir. 1977); *Semancik v. UMW*, 466 F.2d 144 (3d Cir. 1972); *Machinists Fulton Lodge v. Nix*, 415 F.2d 212, 217-218 (5th Cir. 1969). Even where unions purported to do no more than forbid members to libel officers or to make malicious accusations, the courts have consistently held that members' free speech

rights trump the union's disciplinary authority. *E.g.*, *Semancik v. UMW*, 466 F.2d 144, 153 (3d Cir. 1972).[2]

3. As it became clear that union officials could not use union disciplinary tribunals to punish members who dared to speak out against them, and as the courts fashioned effective remedies for violations of the LMRDA, union officials have searched for counter-measures against dissenting members, in order to intimidate them from the exercise of their legal and political rights within the union. One very important weapon on which many union leaders have seized is the tort action — largely for libel or defamation, but using other theories as well — that seek actual and punitive damages from members who have criticized their conduct in office.[3]

Leaders will often file these cases, on a contingent fee basis, using the same lawyers whom they have hired to represent the union. In pursuing such cases, the union leader plaintiffs will often argue that they are entitled to discovery to identify all who might be responsible for the allegedly injurious statements, and thus to identify all persons who

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[2] Because union in this case represents both public and private sector employees, it is a "mixed" union that is covered by the LMRDA. 29 C.F.R. § 452.12 (1994); *Celli v. Shoell*, 40 F.3d 324, 327 (10th Cir. 1994); *Martinez v. AFGE*, 980 F.2d 1039, 1042 (5th Cir. 1993); *Hawaii Gov't Employees v. Martoche*, 915 F.2d 718, 720 (D.C. Cir. 1990).

[3] In that regard, this case is atypical because it was filed by a candidate for union office who complained about statements by a supporter of an incumbent who was seeking re-election. However, the decision below is not limited, and could not easily be limited, to the atypical facts presented.

have associated with the defendants for the purpose of union reform. Incumbents also seek to examine their challengers about the substance of their communications with fellow members, purportedly in order to investigate the truth or falsity of the statements or the failure to be careful about such truth or falsity. Not surprisingly, the discovery will both identify the communicators and reveal their plans and strategies for intra-union reform activity.

Such suits rarely produce a judgment for the plaintiff (not to speak of a collectible judgment, given the assets that rank-and-file union members normally have), but they force a dissident to spend his time, money, and energy on a lawsuit rather than on possible further challenges to the union incumbents. When such cases are brought, the individual union-member defendants must hire their own counsel to defend themselves (which normally cannot be done on a contingent basis). And, unlike LMRDA suits, in which the member may obtain fees pursuant to *Hall v. Cole*, 412 U.S. 1 (1973), courts have not been generally awarded attorney fees to successful union-member-libel-defendants. Consequently, the mere filing of such a tort action will often silence both the individual defendants and any other union members who might otherwise have been tempted to join the dissenters. The Association, which is frequently asked for help by union members facing intimidation from their unions, has found that the bringing of libel actions, or even the mere threat of suit, is having a significant effect in quashing the sort of intra-union activities that Congress intended to foster by passing the LMRDA, and that the courts have routinely found protected in actions contesting union discipline or other infringements of their rights.

4. Most courts recognize that libel or slander actions have the potential to trench on important interests protected by federal labor law, and thus have protected members against such suits by erecting high evidentiary standards that must be met before a suit may succeed. In this regard, they have drawn on several decisions of this Court recognizing a form of federal statutory protection for statements made by unions in the context of union organizing drives or strikes. *Linn v. Plant Guards Local 114*, 383 U.S. 53 (1966); *Letter Carriers Local 496 v. Austin*, 418 U.S. 264 (1974). In those contexts, the federal labor policy recognizes the need for robust and uninhibited expression, and thus requires that, before speakers may be held liable for defamation, the plaintiff must both meet the standards of *New York Times v. Sullivan*, 376 U.S. 254 (1964), by proving that statements were made with actual malice, and prove actual rather than presumed damages. Most state and federal courts have held that statements made in the course of intra-union political debates, whether in union elections or other intra-union controversies, fall squarely within the holdings of *Plant Guards* and *Letter Carriers*.[4]

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[4] *Abrams v. Carrier Corp.*, 434 F.2d 1234, 1254 (2d Cir. 1970) (dictum); *NLRB v. Tanner Motor Livery*, 419 F.2d 216, 221 and n.6 (9th Cir. 1969) (dictum); *Jean v. Dugan*, 814 F. Supp. 1401, 1410 (N.D. Ind. 1993); *Henry v. Air Traffic Specialists*, 836 F. Supp. 1204, 1211 (D. Md. 1993), *aff'd mem.*, 34 F.3d 1006 (4th Cir. 1994); *Rodonich v. Laborers Local 95*, 115 LRRM 2482, 2490 (S.D.N.Y. 1983); *Brett v. Sohio Constr. Co.*, 518 F. Supp. 698, 706 (D. Alaska 1981); *Dazzo v. UAW Local 259*, 448 F. Supp. 799, 802 (E.D.N.Y. 1978); *Batson v. Shiflett*, 602 A.2d 1191, 1208 (Md. 1992); *Sheeran v. Colpo*, 460 A.2d 522, 524 (Del. Super. 1983); *Warren v. Herndon*, 115 Cal. App. 3d 141, (continued...)

Petitioner argued below that his collages were protected by federal labor law, which therefore limited the extent to which state tort law could make him liable to respondent. The Supreme Judicial Court completely misapprehended this argument (although the two dissenters understood it), referring instead to a completely different doctrine, not at all presented here, about the preemptive force of section 301 of the Labor-Management Relations Act when a state law claim substantially depends on an interpretation of a collective bargaining agreement. *See Lingle v. Norge*, 486 U.S. 399, 408-409 and n.8 (1988) (distinguishing section 301 preemption from NLRA preemption). As we have shown, however, federal labor law requires a showing of actual malice before petitioner may be held liable for publishing his collages. Although this federal privilege creates no basis for removal to federal court, it gives petitioner a defense that the state courts were required to recognize, but here did not.

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[4](...continued)
147, 171 Cal. Rptr. 220, 223 (1981); *Ross v. Duke*, 116 Ariz. 298, 300, 569 P.2d 240, 242 (App. 1977); *Beruan v. French*, 56 Cal. App. 3d 825, 828-829, 128 Cal. Rptr. 869, 871 (1976); *McIntyre v. Bakers for Democratic Union*, 54 A.D.2d 872, 388 N.Y.S.2d 587, 588 (1976); *Henderson v. Teamsters Local 313*, 90 Wash.2d 666, 585 P.2d 147, 150-151 (1978); *Lang v. Poffenbarger*, 31 Ohio App.2d 239, 287 N.E.2d 827, 828 (1972); *McKinnon v. Smith*, 52 Misc.2d 349, 275 N.Y.S.2d 900, 903-904 (Sup. Ct.), *aff'd*, 300 N.Y.S.2d 520 (1969). *See also Sheet Metal Workers v. Carter*, 133 Ga. App. 872, 212 S.E.2d 645, 647 (1975) (unspecified tort of injury to reputation). The Fifth Circuit, although citing *Linn* in dictum about intra-union speech, did not expressly state that its standards would apply to a state action for libel. *Machinists Fulton Lodge v. Nix*, 415 F.2d 212, 219 n.17 (1969).

5. Application of these doctrines in this case would require that the judgment below be vacated and remanded for further consideration under standards at least as strict as the standards for which petitioner contends based on his First Amendment arguments. In that regard, we note that, on the present record, it is quite possible that petitioner acted with "malice," if not with "actual malice," as applied to this type of conduct. Moreover, it is not at all clear that the expression here is defensible when considered under a proper standard. It is, however, plain that neither the trial judge nor the Supreme Judicial Court applied the applicable standards under federal labor law.

In summary, the Association agrees that the questions presented in the petition involve important issues of federal law, and it believes that the Court should grant certiorari to decide whether a plaintiff who, like respondent, seeks to hold a union member liable in tort for injurious statements must meet the applicable federal labor law standards. It further believes that the Court can decide that question in the petitioner's favor and thereby avoid reaching the constitutional questions. Accordingly, the Association urges the Court to grant certiorari, and to consider whether the judgment below should be vacated on federal statutory rather than constitutional grounds.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court should direct the parties to address the statutory question as well as the constitutional one.

Respectfully submitted,

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No. 95-393

In the Supreme Court of the United States

October Term, 1995

DAVID HELLER,
Petitioner,

v.

SYLVIA SMITH BOWMAN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
OF THE COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR THE PETITIONER IN REPLY

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

DAVID HELLER,
Petitioner
v.

SYLVIA SMITH BOWMAN,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF
THE COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR THE PETITIONER IN REPLY

Petitioner David Heller respectfully submits this brief in reply to the brief for the respondent in opposition.

In an effort to avoid a grant of certiorari on a constitutional issue that is

plainly of great nationwide significance, the respondent, in her brief in opposition, distorts the record below.

The respondent asserts that Mr. Heller's photocollages were a purely private matter which "had nothing to do with the election" and that there was thus no "nexus between the photocopies and respondent's public figure status" (Brief for Respondent in Opposition, pp. 7, 8). The fact is that the photocollages were produced by Heller, an active campaign worker for Bowman's political opponent, using Bowman's own campaign postcards, and were distributed by him in the midst of a hotly-contested union election campaign.

The respondent quotes out of context

Heller's statement that he did not intend to "have an effect on the overall election" (Brief for the Respondent in Opposition, p. 8). The fact is that Heller made clear that it was his intent to "poke fun at [Bowman's] campaign, just to make a political satire" and that he wanted the photocollages "reflect[ ] the absurdity of some of her views and statements" as a candidate (R. 1074) (emphasis added).

The respondent further asserts that "[f]or several years prior to the incident which gave rise to this litigation, Heller was antagonistic toward Bowman" (Brief for the Respondent in Opposition, p. 2). The fact is that the antagonism between the two was

entirely political -- generated by Bowman's political attacks on Heller, including her statement that she "hate[d] his politics" and her accusation that Heller and his candidate were "communists" (R. 976, 978-979). Heller never criticized her as an employee -- only as a candidate for union office.

While it is true that the distribution of the photocollages was limited to those already favorably disposed to Heller's candidate, it is equally true that election speech is not to be protected only when it is addressed to one's political adversaries or to independents amongst the electorate. Much political expression has historically been addressed to those in one's own camp in order

to rally the troops or to shore up support.

To define "nexus" the way the respondent does is to exclude much that has traditionally fallen within the protections of the First Amendment -- including personal criticism of candidates and satirical attacks on their views which, for better or worse, have become a staple of modern political campaigns in this country.

The respondent concedes that the court below "did not rely upon the lack of nexus between the photocopies and respondent's public figure status" (Brief for the Respondent in Reply, p. 7). In fact, the court below relied upon an argument abandoned by the respondent, namely, that "the

particular union election at issue was not a public controversy sufficient to give Bowman public figure status" (Brief for Respondent in Opposition, p. 5). Respondent abandons this argument for good reason, since it is absolutely clear that a union election campaign for the presidency of a statewide 8,700-member public employees union is the very paradigm of a "public controversy." The respondent is thus compelled to rely on the argument that there is no "nexus" between Heller's satirical photocollages and Bowman's political campaign -- an argument inconsistent with the record.

CONCLUSION

The court below ruled that union elections are no more "public controvers[ies]" than elections for social clubs or condo associations, and that a prominent union political activist running for president of a statewide 8,700-member union was not a limited purpose public figure, despite the election context in which the expression of opinion was published. This ruling has profoundly disturbing implications for the free speech rights of American citizens in union elections and in the workplace. Accordingly, this Court should grant Heller's petition for certiorari.

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QUESTIONS PRESENTED

1. Should this Court grant certiorari when, given that the "statement" at issue was inadequately linked to respondent's involvement in a union election, the case was correctly decided?
2. Should this Court grant certiorari when the courts below correctly considered the context of the statement to determine the applicable scope of First Amendment protection?
3. Should this Court grant certiorari to decide which of the multi-pronged tests courts should follow to determine public figure status under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) when the tests all look to the same core factors and the distinctions amongst the tests are insubstantial?

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No. 95-393

IN THE SUPREME COURT of the UNITED STATES

OCTOBER, 1995

DAVID HELLER,

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SYLVIA SMITH BOWMAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR THE RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

1. Respondent, Sylvia Smith Bowman, joined the Department of Public Welfare as a social worker in 1967. As a consequence of the events at issue, she left the Department with workers' compensation in August 1991. (A.45; R.379.)[1] Petitioner, David Heller, was a social worker in the same

[1] Numbers preceded by "Pet." refer to the Petition for a Writ of Certiorari, dated September 8, 1995; those preceded by "A." or "Ad." refer to the appendix and the addendum attached thereto, respectively; numbers preceded by "R." refer to the Record Transcript, dated April 5-17, 1993; numbers preceded by "B." refer to the appendix attached to the Opposition to the Petition for a Writ of Certiorari, dated November 10, 1995.

office as respondent. For several years prior to the incident which gave rise to this litigation, Heller was antagonistic toward Bowman. Bowman testified that Heller threatened her on one occasion, stating that if she testified regarding another co-worker, "[she'd] be sorry." (R.627.) Heller himself testified to his motivation for spite: he had heard that Bowman had called him a communist (R.978), and she had told him that she "hated his politics." (R.976.)[2]

In October 1987, Heller's hostility led him to contrive a scheme to degrade and humiliate Bowman. Throughout her 20 year career, Bowman had been active in Local 509 of the Service Employees International Union ("Union"). (A.48-49; R.383-384, 650-652.) In 1987, Bowman decided to campaign for the Union presidency. (A.46, 49; R.385-386.) Taking advantage of the availability of Bowman's photograph in her campaign materials, Heller prepared two photocopies consisting of a composite of photographs of naked and partially naked female bodies in sexually explicit poses on which he superimposed cut-outs of Bowman's face and name. (A.46; R.1072-1073, 1159-1162; B.1-2) One photocopy depicted Bowman completely naked in a masturbatory position and the other depicted her legs spread apart to expose her genitals. (A.46; R.1337-1338; B.1-2) Heller then distributed copies of these photocopies to five carefully selected colleagues. (R.1076-1080.) Although Heller asked the distributees not to show or circulate the photocopies to anyone else, and testified that he "never" thought Bowman would see the photocopies, (R.1079-1080), the Worcester Office of the Department of Public Welfare was quickly infested with reproductions of Heller's creations. (A.52.) Bowman was soon bombarded with comments relating to the photocopies.

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[2] Petitioner makes much of allegations that respondent used sexual epithets in the workplace, without identifying any possible relevance of these alleged statements to the merits of respondent's claims. Significantly, the trial court made no finding on this issue.

Her supervisor told her that he had seen them and that they "excited him" and "gave [her] a wonderful body." (R.392.) Other colleagues made similar statements, remarking on her "fine body" and the attention she would receive from the photocopies. (R.392-393.)

It is clear from the record that Heller prepared and distributed the photocopies motivated solely by ill-will and animosity toward Bowman, and not for any higher political purpose. Heller testified that he did not intend "to have an effect on the overall election" (R.1178), he did not intend to induce people not to vote for Bowman (R.1178), and he did not "intend to degrade Bowman as a candidate." (R.1122.) Rather, the photocopies were meant to be a "private joke" (R.1196) to be shared with five employees who appreciated Heller's "off-color humor" (R.1078-1079) and who had already "made up their minds" with respect to the upcoming election. (R.1178.) He further testified that he took pains to ensure that the photocopies would go no further, and that he "never thought [Bowman] would see [them] in a million years." (R.1079.) Yet, raising the First Amendment issue at trial, Heller attempted to transform his crude personal attack upon a co-worker into enlightened political discourse. Although he testified that he intended to make Bowman "look [as] ridiculous" as he felt her ideas were (R.1168), he was unable to articulate how the images he crafted of Bowman reflected anything about her political positions or integrity as a candidate. (R.1167-1168.)

When Bowman saw the photocopies, she was so shocked that she could not clearly recall the events of the next few hours. (A.54; R.400-401.)[3] The photocopies made her feel

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[3] Petitioner suggests that the acute emotional distress Bowman suffered was feigned because the photocopies were similar to other pictures that frequently circulated through the office. (Pet.8.) The record is clear

(continued...)

"fearful," "vulnerable" and "degraded." (A.81.) The trial court found the photocopies "intimidating" and that they "reduced [Bowman] to nothing more than a naked woman, spread-eagled and exposed." (A.87; R.39.) Bowman's treating psychologist testified that the photocopies caused Bowman to suffer from Post-Traumatic Stress Disorder, which includes symptoms of fearfulness, flashbacks, difficulty with memory and concentration, uncontrollable crying and loss of trust. (A.57-58; R.494-495.) This testimony went uncontradicted.

2. Bowman filed suit in the Suffolk County Superior Court, alleging a variety of claims based upon Heller's preparation and distribution of the photocopies, including claims for intentional and reckless infliction of emotional distress, defamation and violations of the Massachusetts Civil Rights Act. Judge Flannery ruled that Bowman had proven all the elements of intentional infliction of emotional distress under Massachusetts law and that Heller had violated Bowman's statutory right to be free of sexual harassment,[4] and awarded Bowman $35,000 in damages.

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[3](...continued)
that the Bowman photocopies differed markedly from all other previously circulated photocopies in their focus on an identifiable co-worker from the same office and their sexually-explicit content. (A.52, 63; R.26, 235, 266-267, 1147-1148, 1185-1186.) Moreover, given the practice in the Department of circulating "humorous" material (A.51-52; R.235, 267), the trial court concluded that Heller had to be aware that Bowman was substantially certain to see the photocopies. (A.51-52.)

[4] Although the trial court found ample evidence to conclude that Heller's conduct "clearly created an 'intimidating, hostile, humiliating or sexually offensive work environment,'" (A.82) (citations omitted), the Supreme Judicial Court of Massachusetts summarily disposed of Bowman's claim that Heller's actions violated her right to be free from sexual harassment under the Massachusetts Civil Rights Act (Mass. Gen. L. ch. 12 § 11I (1995)). (A.6 n.4.)

In addressing the First Amendment issue, the trial court held that although Bowman was a limited purpose public figure as a result of her candidacy in the Union election, the photocopies fell outside the scope of First Amendment protection because: (1) they were devoid of an articulable message and thereby differed from the political satire protected by this Court in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), and (2) "First Amendment concerns are subject to various restrictions in the workplace where employees may be a captive audience." (A.70.) The trial court's well-reasoned opinion was grounded in a fact-specific determination of both the context of the alleged speech and its utter lack of content.

3. Heller appealed, and the Supreme Judicial Court of Massachusetts took jurisdiction of the matter *sua sponte*. The Supreme Judicial Court affirmed the trial court's determination that Heller's photocopies were not entitled to First Amendment protection under *Hustler Magazine*, stating that an individual's status as a public figure is "context-dependent" (A.13) and that the particular union election at issue was not a public controversy sufficient to give Bowman public figure status.

Because it concluded that there was no public controversy, the court found that it "need not decide if the defendant's cartoons were germane to the plaintiff's participation in the [U]nion election." (A.16 n.8.) However, as the trial court found (A.68-69), and as discussed *supra*, there is ample evidence to demonstrate that the cartoons were not germane, thus underscoring the correctness of the result below.

REASONS FOR DENYING THE WRIT

BASED ON THE PARTICULAR FACTS OF THE CASE, THE FINDING THAT BOWMAN IS NOT A LIMITED PUBLIC FIGURE IS NOT CONTRARY TO THIS COURT'S HOLDING IN *GERTZ V. ROBERT WELCH, INC.*, 418 U.S. 323 (1974).

A. Respondent Is Not A Limited Public Figure With Respect To The "Speech" At Issue Because There Is No Nexus Between That Speech And The Issue With Respect To Which Petitioner Claims She Was A Public Figure.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), this Court first elaborated the distinction between limited and all-purpose public figures. This Court there held that the actual malice standard developed in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), is to be employed in defamation actions brought by all-purpose public figures, those who "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes," *Gertz*, 418 U.S. at 345, and in actions brought by limited public figures, those who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Id.*

In keeping with the underlying philosophy of *Gertz*, lower courts, with virtual unanimity, have held that before the actual malice standard can be applied against a limited public figure, the defendant must demonstrate that the statement at issue was "adequately linked" to the matter with respect to which the plaintiff entered the public limelight. *Clyburn v. News World Communications, Inc.*, 903 F.2d 29, 32 (D.C. Cir. 1990). *Accord Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1298 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980) (statement must be "germane to the plaintiff's participation in the controversy"); *Roffman v. Trump*, 754 F. Supp. 411, 417

(E.D. Pa. 1990) (statement must "relate to the public issue in which the plaintiff became involved").[5] Petitioner has utterly failed to demonstrate that the "speech" in question — the photo-collages of respondent's head affixed to sexually explicit naked and partially naked female bodies — bore any connection to the Union election. Although the court did not rely upon the lack of nexus between the photocopies and respondent's public figure status, respondent is entitled "to defend [the] judgment on any ground properly raised below whether or not that ground was relied upon, rejected or even

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[5] Petitioner's suggestion that state and federal courts use diverse criteria in applying the *Gertz* standard, and therefore this Court should grant the writ, is misguided. Merely dividing an analysis into a different number of factors is not an indication of diverse criteria. In fact, the courts themselves have acknowledged that the varying applications of the *Gertz* test are consistent in spite of the fact that different courts use a differing number of steps. *See, e.g., Naantaanbuu v. Abernathy*, 816 F. Supp. 218, 224 (S.D.N.Y. 1993). Clearly, the fact that courts articulate tests differently does not necessitate diverse outcomes. Each court employing the *Gertz* test looks to the same core factors: whether the target entered the public sphere and whether the statement at issue relates to the public side of the plaintiff's life. There are many circumstances in which courts use different tests to reach substantially the same results. *See, e.g., Sandison v. Michigan High Sch. Athletic Ass'n*, 64 F.3d 1026, 1030 (6th Cir. 1995) (four-prong test for determining whether to issue a preliminary injunction); *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1453 (7th Cir. 1995) (two-prong initial test, followed by a balancing test); *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 332 (2d Cir. 1995) (two-prong test); *cf. Versa Prods. Co. v. Bifold Co.*, 50 F.3d 189, 199, 202 (3d Cir. 1995) (ten-factor test to determine likelihood of confusion); *Universal Money Ctrs., Inc. v. AT&T*, 22 F.3d 1527, 1530 (10th Cir.), *cert. denied*, 115 S. Ct. 655 (1994) (four-factor test); *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979) (eight-factor test). These formulaic distinctions are not the types of splits among the courts that the writ of certiorari was designed to remedy.

considered." *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 478 n.20 (1979).[6]

As the extensive record demonstrates, and the trial court found, petitioner's "private joke" (R.1196) had nothing to do with the election. Petitioner acknowledged that he did not intend to "have an effect on the overall election" (R.1178), did not intend to induce people not to vote for respondent (R.1177-1178) and did not intend to "degrade Bowman as a candidate." (R.1122.) In fact, Heller only distributed the photocopies to five co-employees who had already "made up their minds." (R.1178.) He never meant to influence the overall election: indeed he averred that he took pains to keep his handiwork out of the marketplace of ideas. (R.1079, 1178-1179.) In light of the personal antagonism petitioner felt for Bowman (R.627, 976, 978), any political purpose contrived by petitioner's counsel is a transparent afterthought.

The absence of any nexus to Bowman's limited public status is critical to the instant case. Unlike the respondent in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988),[7] Bowman

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[6] Given that the result in this case is the correct one, and that the writ is to be granted "only for compelling reasons" (Sup. Ct. R. 10), any inconsistency between the rulings of this and other courts and the Supreme Judicial Court of Massachusetts' determination that this plaintiff, on these facts, was not a public figure, does not make this case worthy of certiorari.

[7] Throughout his argument, petitioner tries to pique this Court's interest by claiming that respondent has attempted to cloak herself in the garb of "political correctness," and that the only difference between respondent and Jerry Falwell is one of gender. This is a faulty assertion; the facts here and those in *Hustler* are readily distinguished. *Hustler* involves a "nationally known" public figure; this case does not. *Hustler* involves a widespread dissemination in a public arena; this case involves dissemination in the target's workplace. And finally, *Hustler* involves speech relevant to the target's position and reputation; this case does not.

is not an all-purpose public figure whose name is a "household word." *Tavoulareas v. Piro*, 817 F.2d 762, 772 (D.C. Cir.), *cert. denied*, 484 U.S. 870 (1987). If Bowman is to be labeled a public figure at all, she may be so identified only for the very specific purpose of the Local 509 Union election of 1987.[8] Heller's photocopies, depicting Bowman's head superimposed over naked bodies in sexual poses, are simply not "adequately linked" to the election. *Clyburn*, 903 F.2d at 32. The figure of a naked woman does not send a message about one's integrity as a candidate. *See Phyfer v. Fiona Press*, 12 Med. L. Rptr. 2211 (N.D. Miss. 1986) (photograph of naked woman, identified as plaintiff, found to have no relation to plaintiff's status as elected official or political candidate); *cf. Naantaanbuu v. Abernathy*, 816 F. Supp. 218 (S.D.N.Y. 1993) (allegations of romantic involvement with Dr. Martin Luther King, Jr., are outside the scope of limited public figure status created by running for political office). Without having put her personal, sexual mores at issue, respondent cannot be a limited purpose public figure with regard to petitioner's creation. *See Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 136-38 (2d Cir. 1984), *cert. denied*, 421 U.S. 1054 (1985) (plaintiff, having injected herself into societal debate over sex and nudity, found to be a limited public figure for that purpose and photograph of a naked woman, identified as plaintiff, found to be relevant to that debate).

We do not deny that a "candidate who vaunts h[er] spotless record and sterling integrity cannot convincingly cry 'Foul!' when an opponent . . . attempts to demonstrate the contrary," but this is simply not the setting of the present case. *Monitor*

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[8] Thus, petitioner's likening of respondent to President Kennedy, Jesse Jackson, Richard Nixon, Bill Clinton, Hillary Rodham Clinton, and others is preposterous. (Pet.22; Ad.1-9.) Those individuals are all-purpose public figures, and as such all aspects of their lives are exposed to scrutiny.

Patriot Co. v. Roy, 401 U.S. 265, 274 (1971), *quoted in Hustler v. Falwell*, 485 U.S. 46, 51-52 (1988). Petitioner has never asserted either that the "speech" in question was in retaliation for the manner in which Bowman portrayed herself as a candidate or that the "speech" was intended as an assault on Bowman's integrity as a candidate. Heller's "private joke," at the expense of an elderly woman whom he disliked, was to be shared only with a select few who shared his "off-color humor." (R.1075-1080.) In fact, he explicitly told those colleagues to whom he gave the photocopies not to show or circulate them. (R.1079-1080.) It is clear under these covert circumstances that the photocopies were not intended to be — and never were — the political satire which petitioner now contends. Heller wanted to make Bowman "look ridiculous" irrespective of the Union election. The trial court, which heard the testimony and was best able to evaluate Heller's credibility and intent, concluded that "no articulable political statement [could] be gleaned from the photocopies of Bowman." (A.68.)

Even in those cases petitioner cites to support his contention that candidates for union elections are per se public figures, the courts have engaged in this type of factual analysis. In *Materia v. Huff*, 394 Mass. 328 (1985), the "facts essential" in determining whether the target was a public figure were agreed by the parties to be the following:

> [The target] had been secretary-treasurer of Local 526 for fifteen years and was seeking another term in office when the alleged defamation occurred. The letter in dispute, signed by . . . the opposing slate in the election campaign, *attacked the [target's] past performance as a union official.*

Id. at 330 (emphasis added).

Similarly, most of the other cases relied upon by petitioner make clear that the targets were public figures because the speech involved the targets' status and their *special duties as union officials*. *See Miller v. Transamerican Press*, 621 F.2d 721 (1980), *cert. denied*, 450 U.S. 1041 (1981); *Lins v. Evening News Assoc.*, 129 Mich. App. 419 (Ct. App. 1983); *City Firefighters Union Local 28 v. Duci*, 104 Misc. 2d 498 (Sup. Ct. N.Y. Co. 1976); *see also Miles v. Perry*, 11 Conn. App. 584, 592 n.7 (App. Ct. 1987) ("[u]nion officers are generally held to be public figures for purposes of union business"). In the remaining cases either the parties agreed to the "public figure" label, the court never reached the question of whether the target was a public figure, or the speech involved was clearly related to the limited purpose for which the target was deemed to be a public figure.

The determination of the nexus between speech and an individual's public involvement is, by its very nature, a fact-specific inquiry. Reasonable triers of fact will therefore differ in their resolutions of this query. Accordingly, even if this Court were to determine that petitioner's speech bore a sufficient relation to respondent's public involvement, the import of this holding would be necessarily limited to the case at bar and would not constitute "compelling reasons" justifying this Court's grant of certiorari. Sup. Ct. R. 10.

B. The Context Of The Statement At Issue, Made To A Captive Audience In Contravention Of Established State Interests, Weighs In Favor Of Lesser First Amendment Protection.

This Court has long recognized that the particular context of speech will determine the appropriate scope of First Amendment protection. As Justice White stated, "[t]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. International Soc'y for Krishna*

Consciousness, Inc., 452 U.S. 640, 647 (1981) (holding fairgrounds context to be relevant to proper scope of First Amendment protection). In many other contexts this Court has declared that countervailing governmental interests necessitate a lesser scope of First Amendment protection. *See, e.g., Waters v. Churchill*, 114 S. Ct. 1878, 1886 (1994) (plurality opinion), 1891 (Souter, J., concurring) (public employment);[9] *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (public schools); *Greer v. Spock*, 424 U.S. 828 (1976) (military bases); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (city rapid transit cars); *Adderley v. Florida*, 385 U.S. 39 (1966) (jails).

One context this Court has repeatedly determined warrants a diminished scope of First Amendment protection is the "captive audience." The special interests of the listener who is not free to leave must be considered in determining the appropriate scope of First Amendment liberty. *See Frisby v. Schultz*, 487 U.S. 474, 487 (1988) ("The First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech"); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 542 (1980) (government can prohibit speech as intrusive if "the 'captive' audience cannot avoid objectionable speech"); *Lehman*, 418 U.S. at 302 (audience is captive if it is "there as a matter of necessity, not of choice").

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[9] In *Waters*, the plurality opinion stated that, the First Amendment notwithstanding, it may be appropriate for a government employer such as the one in this case to prohibit its employees from using rude or offensive language in the workplace. The plurality concluded that "[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." *Id.* at 1888.

As the late Chief Justice Warren recognized, "[e]mployees during working hours are the classic captive audience." *NLRB v. United Steelworkers*, 357 U.S. 357, 368 (1958) (Warren, C.J., dissenting in part and concurring in part); *accord Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1535 (M.D. Fla. 1991) ("'Few audiences are more captive than the average worker'") (quoting Balkin, "Some Realism About Pluralism: Legal Realist Approaches to the First Amendment," 1990 Duke L. J. 375, 423-24), *cross appeals dismissed per stipulation* (March 14, 1995); *Commonwealth v. A Juvenile*, 368 Mass. 580, 583 (1975)[10] ("store employees were involuntarily present" during offensive speech and "could not be expected to abandon their" positions). In keeping with the above authority, the trial court stated that "First Amendment concerns are subject to various restrictions in the workplace where employees may be a captive audience." (A.70.) *See also* Suzanne Sangree, "Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight," 47 *Rutgers L. Rev.* 461 (1995) (arguing that employees are the prototypical captive audience).

There can be little doubt that Bowman, as a full-time employee of the Department of Public Welfare, was held captive to Heller's attacking speech — speech that generated an increasingly hostile environment for Bowman. Short of leaving her job of twenty years, Bowman simply had no way of avoiding the objectionable speech and its consequences.[11]

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[10] The statute examined in *A Juvenile*, Mass. Gen. L. ch. 272 § 53 (1973), was amended in 1983, thereby superseding the principal holding. However, the statutory amendment in no way alters the principle for which respondent cites to this case.

[11] Any suggestion that Bowman was not a captive audience because she could have chosen not to view the photocopies is absurd. Her workplace was infested; the photocopies had become the talk of the

(continued...)

It is indisputable that Massachusetts has a valid interest in protecting employees from the type of speech petitioner uttered in the instant case. States have a long-recognized interest in keeping the workplace free from discriminatory and harassing speech, an interest which necessarily limits the degree of First Amendment protection to be provided such speech.[12] *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992) (noting that "sexually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices"). This Court and others have been particularly sensitive to abuses in the workplace, *see*, *e.g.*, *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367, 370 (1993) (finding Title VII violation when the workplace is "permeated with 'discriminatory intimidation, ridicule, and insult,' . . . that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment'"); *Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503 (11th Cir. 1989), *cert. denied*, 115 S. Ct. 1110 (1995) (holding that symbolic references to lynching could be restricted in the workplace), and courts have not hesitated to uphold restrictions on speech when that speech creates a hostile work environment. *See Robinson*, 760 F. Supp. at 1535 ("[Pornographic] pictures and verbal harassment are not

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[11](...continued)
office. (A.81.) Indeed, Bowman was subjected to comments from both her supervisor and her colleagues about her new "wonderful," "fine" and "excit[ing]" body. (R.392-393.)

[12] This Court has "long recognized that not all speech is of equal First Amendment importance." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985). Speech that is "vulgar," "offensive" and "shocking" is "not entitled to absolute constitutional protection under all circumstances." *FCC v. Pacifica Foundation*, 438 U.S. 726, 747, *reh'g denied*, 439 U.S. 883 (1978). Heller's crude photocopies, if speech at all, should be considered low-value speech meriting lesser constitutional protection.

protected speech because they act as discriminatory conduct in the form of a hostile work environment."); *EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272, 1280 (9th Cir. 1982) (compelling interest in eliminating gender discrimination in the workplace may justify First Amendment restrictions). There can be little doubt that the photocopies, which reduced Bowman in front of her supervisors and colleagues to "nothing more than a naked woman, spread-eagled and exposed" (R.39) created a hostile environment in which Bowman was required to work.

Enforcing a civil judgment for intentionally tortious conduct is an appropriate means for the state to demonstrate its substantial interest in protecting workers from sexual harassment. While it is true that Bowman's claims under the Massachusetts Civil Rights Act were dismissed on appeal,[13] the state interest in maintaining a workplace environment free of discrimination derives its roots not merely from specified statutory prohibitions, but from common law concerns of equity, fairness and equality. *See Foster v. Albertsons, Inc.*, 254 Mont. 117, 126 (1992) ("Montana has recognized a common law cause of action for retaliatory discharge related to sexual harassment"); *Kerans v. Porter Paint Co.*, 61 Ohio St. 3d 486 (1991) (creating common law remedy for sexual harassment); *Collins v. Rizkana*, 73 Ohio St. 3d 65 (1995) (adopting common law tort of wrongful discharge in violation

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[13] The Commonwealth of Massachusetts conditions a judgment under its Civil Rights Act on a finding of threats, intimidation, or coercion. It was because of this added requirement, which is not necessary to establish sexual harassment under the law prohibiting employment discrimination in Massachusetts, Mass. Gen. L. ch. 151B § 1.18 (1995) or under federal law, Title VII, 42 U.S.C. § 2000a (1995), *et seq.*, that the Supreme Judicial Court vacated the trial court's judgment under the Massachusetts Civil Rights Act. Because Bowman did not raise a claim under these more specific laws prohibiting sexual harassment, the lower courts were not required to determine whether their statutory requirements were met here.

of public policy based on workplace sexual harassment. Court held that statutory prohibitions against sexual harassment do not preclude adoption of common law tort given strong public policy at issue); *Dias v. Sky Chefs, Inc.*, 1989 U.S. Dist. Lexis 497 *18 (D. Or. 1989), *aff'd*, 919 F.2d 1370 (9th Cir. 1990), *vacated on other grounds*, 501 U.S. 1201, *aff'd*, 948 F.2d 532 (9th Cir. 1991), *cert. denied*, 503 U.S. 920 (1992) (holding common law action for wrongful discharge based upon protestation of sexual harassment not preempted by pertinent statutory prohibitions). Massachusetts chose to protect its employee from that hostile work environment by, *inter alia*, permitting claims under the tort of intentional infliction of emotional distress.

As the trial court properly concluded, when "speech" is directed at a captive audience in contravention of established state interests, that context is relevant to, though not dispositive of, the First Amendment analysis. In the instant case, where the "speech" is simply not germane to respondent's status as a limited public figure and where the context calls for a diminished level of First Amendment protection, the Massachusetts' courts were correct in refusing to require a showing of actual malice.

Petitioner's final contention, that the court below engaged in viewpoint discrimination, because its ruling was "premised upon findings of fact that 'establishe[d] an "approved" view of women'" (Pet.33), is baseless. Neither of the courts below devised a standard as to what would be an acceptable portrait of a woman. The Supreme Judicial Court of Massachusetts never addressed the substance of the photocopies. (A.16 n.8.) To the extent the trial court considered the content of the images, it was for the entirely appropriate determination of whether there was a nexus between the images and the purpose for which Bowman may have been a public figure. (A.70.) Petitioner's fallacious argument that viewpoint discrimination occurred below is simply another transparent

attempt to portray this correctly decided, fact-specific case as worthy of this Court's review.[14]

CONCLUSION

Heller's *post hoc* attempt to convert his crude photocopies of Bowman into some sort of political satire makes a mockery of one of this country's most treasured principles, that the free exchange of ideas is constitutionally protected. The record demonstrates, and the trial court so found, that Heller's purpose in preparing the images was not to sway votes or influence the election but rather to ridicule and demean a female co-worker he disliked. This "speech" bore no relation to Bowman's possible status as a limited purpose public figure. There is no constitutional shield for mounting a personal attack against a co-employee. *Briggs v. Village of Dupo*, 892 F.2d 1298, 1302 (7th Cir. 1990) ("First Amendment does not protect public employees' ordinary personnel disputes").

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[14] A further example of petitioner's attempt to muddy the waters is his invocation of *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 115 S. Ct. 2338, 2345 (1995). *Hurley* concerned a parade — a gathering together of people to express themselves as a group with a common purpose — which in and of itself is an expression protected by the First Amendment. In that context, this Court correctly found that a "narrow, succinctly articulable message is not a condition of constitutional protection" when referring to parade participants. However, in the present case, a nexus must exist between the speech and the limited purpose for which a person is a public figure. *See, e.g., Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1295 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980). A search for a message is thus appropriate. Here again, as is the case throughout the petition for certiorari, petitioner conflates the analysis for all-purpose public figures with that for limited public figures.

For all the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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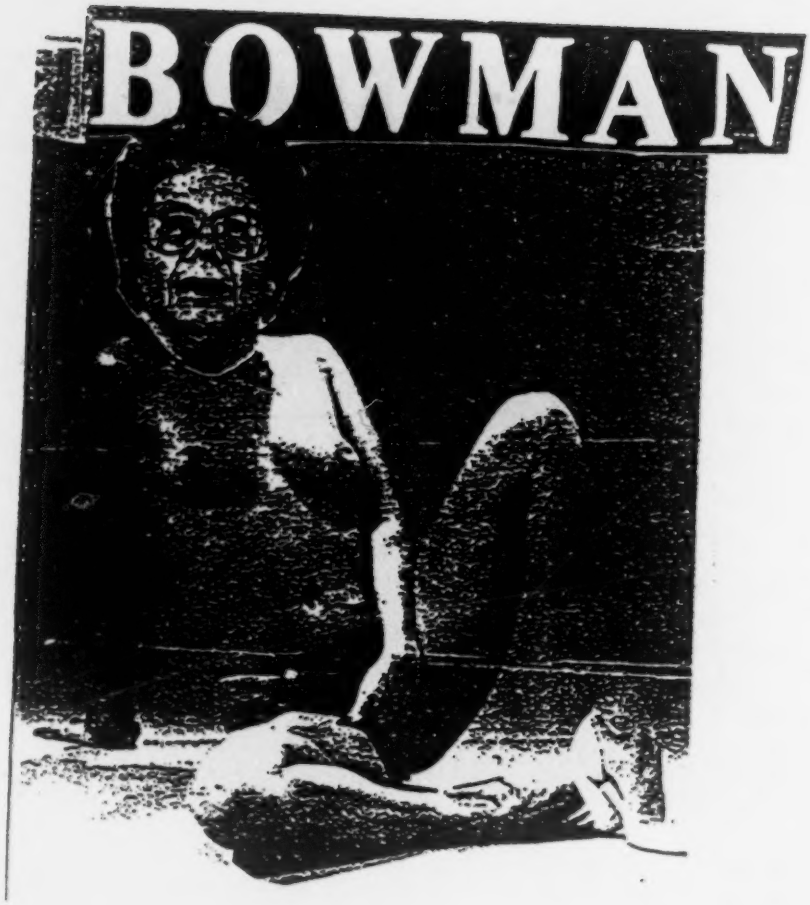
APPENDIX


BOWMAN

BOWMAN